OPINIONS

WILLIAM MACKI[illegible]

Edinburgh:

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OPINIONS OF THE JUDGES.

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IN

NOTE

FOR THE

LIQUIDATORS OF THE CITY OF GLASGOW BANK

AGAINST

WILLIAM MACKINNON.

FIRST DIVISION.

FRIDAY, 23d DECEMBER 1881

THE LORD PRESIDENT.—The serious and important questions which we are now to determine have arisen in the course of the Liquidation of the City of Glasgow Bank.

On the 13th November 1880, the Liquidators presented to the Court a Note, under the authority of the 165th section of the Companies Act 1862, in which they claim from Mr William Mackinnon, a director of the Bank from 1858 till 1870, the sum of £311,666, 16s. 9d., paid away to the shareholders as dividends between 1858 and 1870, on the recommendation of the directors, including the Respondent Mackinnon, on the ground that this sum did not represent profits earned, but was, in effect, paid out of the capital of the Bank.

If this charge be proved, it certainly amounts to a breach of the Bank's contract by those who were appointed to administer its affairs, and, independently of special contract, it would be at common law a gross breach of trust.

It is not a charge of negligence, or failure in duty; the fact alleged is an overt act of misapplication of a large portion of the Bank's capital, done knowingly and wilfully.

But an allegation, that dividends have been paid out of capital, may be either a very simple act of misfeasance, easily proved as matter of fact, or it may be only an inference in fact from complicated and continuous transactions stretching over a long course of years, and capable of being construed and judged of only by the application of commercial and actuarial knowledge and skill. That the present case belongs to the latter, and not the former of these categories, may be presumed from the almost unprecedented bulk and variety of the evidence laid before the Court.

The task of analysing and digesting this evidence has necessarily occupied a long time But the results of our deliberations may, I think, be stated within a comparatively short space.

In 1856 Mr William Gemmel had acquired from an American Railroad Company, called the Racine and Mississippi Railway Company, a number of bonds for $1000 each, which were a first charge on the line, bearing 8 per cent interest, having a currency of about thirty years, with a provision of a sinking fund of 1½ per cent. to be set aside annually to reduce the principal.

The Bank agreed to make, and did make, advances on the security of these bonds, and certain other stocks belonging to Mr Gemmel, or other parties for whom he acted, in 1856 and 1857.

On the 11th November 1857 the Bank stopped payment, and did not resume business till the 31st December thereafter. At this date the advances made by the Bank on the securities above-mentioned amounted to £117,608 The railway bonds held in security for this advance were of the nominal value of £134,000

Up to this time the Respondent, though a shareholder of the Bank, had never been a director, or been concerned in any way in the management of its affairs But an Investi-

gation Committee having been appointed, composed partly of shareholders, and partly of merchants and accountants unconnected with the Bank, Mr Mackinnon was about the same time named a member of a Shareholders' Committee, who were to co-operate with the directors. The Investigation Committee made a full inquiry into the affairs of the Bank, and its financial condition at the time of its stoppage, and, at a meeting of shareholders on the 8th of December 1857, their report was considered, the result being a resolution to resume business

The Respondent thus became acquainted with the way in which the advance of £117,000 had been made, and with the nature of the securities held for the same But neither in the Report of the Committee of Investigation, nor at the meeting of shareholders, was doubt expressed as to the propriety of the advance, or the sufficiency of the securities

The bonds already mentioned extended over the part of the railroad which was finished from Racine to Beloit But in February 1858, after resuming business, the Bank made farther advances on the security of bonds of 1000 dollars each, over a farther portion of the line which had then been constructed.

Both sets of bonds were a first charge on the railway, and the bonds, with their coupons, furnished security (such as it was) for the interest as well as for the principal advanced.

As to the estimated value of these securities, it is enough to say at present, that the Railway Company were in great embarrassment, in consequence of the depression caused by the war between the Northern and Southern States, and were not in a condition to pay the interest as it accrued due. But if the line afforded a good ultimate security for the principal and interest of the whole bonds issued by the Railway Company, which were a first charge, the non-payment of interest was, in practical effect, nothing else than an additional advance by the Bank on security.

The Bank had agents in New York named Irvin & Company, who seem to have been persons of high character, and who, in their correspondence with the manager, while admitting the impossibility of realising during the war, gave a

confident opinion as to the ultimate sufficiency of the securities for both principal and interest.

It was in these circumstances that the Respondent became a director of the Bank in July 1858; and the first overt act of misfeasance charged against him is, that he, as a director, signed the balance-sheet of 1859, to be submitted to the shareholders at the annual meeting of that year.

The financial year of the Bank ended in June 1859, and the interest due on the American railway securities, amounting to £7552 for the year, was added to the amount of the debt in the Bank books at that date, and was carried to the credit of the Profit and Loss Account. The result, of course, of the operation was, to increase to that extent the balance of profit for the year appearing in the balance-sheet.

The contention of the Liquidators is, that the interest for the year, £7552, not having been received, was not profit, and the dividend of the year was to that extent paid out of capital.

But if no dividend could be paid except out of cash in hand or in Bank, representing profits or interest actually received, it is obvious that the business of such a Company could not be practically carried on, and the existing shareholders of the Company would have good reason to complain, that they were deprived of their just share of the profits of the concern actually earned and well secured, because these profits could not be converted into cash before the balance-sheet of the year was struck.

When profits have been earned and not paid, but invested on undoubted security, and these profits have been carried to the credit of the Profit and Loss Account, and a dividend declared and paid out of the balance of profits thus obtained, it is no doubt true, in a literal sense, that the dividend is to the extent of these unpaid profits paid out of capital; because the Company not having cash to represent these earned and secured profits, must find the money to pay the dividend elsewhere, and they can find it nowhere except by applying to the purpose cash which forms part of the floating balance of capital. But if the unpaid profits are fully secured, they become a part of the capital of the Company, as a *surrogatum* for the cash of equal amount taken from the floating capital and paid as dividend; and thus the

capital is not diminished, but a certain part of the floating balance of capital becomes invested in the securities which the Company hold for the earned but unpaid profits in question.

From this it seems to me to follow, that in order to convict the directors of this Company of paying a dividend out of capital in 1859, it is necessary to prove not merely (1) that they knew that the interest on the American railway investment though due was not paid, and (2) that it was brought to the credit of profit and loss, and so divided as clear profit, but also (3) that they had not reasonable ground for believing, that the interest was well secured and would ultimately be recovered.

If they had reasonable ground for so believing, they acted in good faith, and so cannot be said to have committed a breach of trust; for while it is the duty of directors to act very cautiously in estimating the securities which they hold, they are necessarily left, by the very nature of their office, to exercise their own judgment and discretion in making such estimate. They owe to the Company an obligation to leave a safe margin in striking the balance of profit and loss, so as not to endanger its financial position. But they are equally bound to have a due regard to the interests of the individuals who for the time are the holders of the stock of the Company, and to whom they are under an honourable, if not also a legal obligation, to pay such a dividend as in their opinion may fairly be paid out of the profits, consistently with the financial well-being of the Company.

If, indeed, it could be shewn that, when the Respondent and the other directors recommended the dividend of 1859, they were in the knowledge that the securities which they held for the outstanding and unpaid interest were truly and substantially unsound, and such as would not have been relied on by prudent mercantile men in the management of their own affairs, I should not think it by any means a sufficient defence of what they did, that the securities were nominally of sufficient value. I should regret extremely, if the opinion I express could be construed to justify directors in treating such a matter lightly or negligently. But on a full consideration of the evidence, I am satisfied that, in the present case,

the directors acted not only in good faith, but with fair and reasonable grounds for the judgment which they formed.

I have hitherto confined my attention to the conduct of the directors in 1859 (the first year of the Respondent's official responsibility), because it conduces to simplicity and clearness to state the principles, on which I think this case must be decided, as applicable to one period and one act of alleged misfeasance. But it is of course necessary to have regard to the whole conduct of the directors from that year down to 1870 (when the Respondent resigned), to determine whether the considerations which seem to me to justify the recommendation of the dividend of 1859 are equally applicable to the varied condition of the American securities during the subsequent years.

If, however, I should attempt to give a detailed and connected history of the American railroad, and the relations of the Bank to its concerns and prospects, during the whole years of the Respondent's official connection with the Bank, I should necessarily exceed, to an enormous and unjustifiable extent, the reasonable and usual limits of a judicial opinion. I can only therefore undertake to state the results of a careful study of the whole evidence.

I give no opinion as to the wisdom or prudence of the original advances made by the Bank on the security of the railway bonds, for two reasons—(1.) Because the Respondent was not a director when they were made, but took them up on his joining the direction as an investment, to which no objection had been made by the Committee of Investigation, or by the shareholders when their attention was called to the matter, during the temporary suspension of the Bank's business in 1857; and (2.) Because the wisdom or prudence of such investments generally must be judged of by persons of mercantile, rather than of legal knowledge and experience, and I cannot find that there is any such concurrence of opinion in the evidence, as could lead me to hold that the original investment must be condemned as exceptionally unwise and imprudent.

One salient point in the case is, that in progress of time the Bank's interest in the Railway, and the amount of money that they embarked on the faith of its ultimate prosperity and success, increased from £117,000 to £905,000 (including,

however, the unpaid and accumulated interest) during the Respondent's connection with the direction; and this, on a superficial consideration of the history of the case, has undoubtedly a good deal of the appearance of what is colloquially called throwing good money after bad. But I am satisfied that would be a rash and unjust conclusion, if it be true, as the Respondent contends, that the sum of the Company's capital which he left invested in the American Railway's securities, when he resigned as a director in 1870, was well secured. At that date the figures stood thus:—The total amount of principal and interest due to the Bank was £905,166. The nominal amount of the securities held for this debt was £974,866, leaving a margin of £69,700 in favour of the Bank. Of course, everything depended on the real value of the securities.

It has not been suggested on the part of the Liquidators, that it would have been prudent to write off the debt secured on the American railways as a bad debt, either in respect of principal or interest, when the Respondent entered on his duties as a director, and I do not understand that such a proceeding would, in the view of the Liquidators, have been justifiable at any time between 1858 and 1870. If such a course had been adopted, the directors would, as a necessary consequence, have ceased to take any steps for improving their position as creditors in the railway bonds, or even to expend any money in watching over their interests as such creditors. But if this course was not to be followed, then it must be at once apparent that, from the nature of the investment and the financial condition of the United States at the time, this portion of the Bank's assets required the most vigilant attention, and, if necessary, the expenditure of more money, in the hope of tiding over difficult and embarrassing times.

It very soon became clear that, unless the directors were prepared to encounter the loss of their advances of £117,000, with accruing interest, they must make up their minds to 'nurse the line,' *i.e.*, they must advance more money to enable the railroad to be completed to such an extent as to connect Lake Michigan with the Mississippi, without which it could not ultimately prove a paying concern. They had also to prevent or discourage damaging competition, and to get the

management of the line out of incompetent and untrustworthy hands

In the course of all these complicated proceedings, they had the constant advice and assistance of Messrs Irvin, of New York, whose correspondence proves them to have been persons of large experience and capacity in dealing with such affairs, and they had a special agent, Mr Thomson, who was on the spot, and who, if somewhat sanguine, was also a very energetic and able man.

The whole money advanced under this advice was secured on substantially the same kind of securities as the Bank held from the beginning, and the securities obtained were always large enough, at least nominally, to cover all the overdue interest for the time.

The directors had been constantly assured by their agents, during the twelve years in question, that their investments were sound, and in the end would certainly prove good both for principal and interest

Notwithstanding these assurances, the directors were very anxious to realise their investments, because they naturally felt, that there was too much of the Bank's funds locked up in one class of securities, which were for the time unproductive; and their desire to realise was uniformly pressed on their agents and advisers in America. But here they encountered a great difficulty, in consequence of the rate of exchange between the United States and this country. If they had disposed of their interests in the railways, they could not have obtained payment of the price except in United States currency, which could not be converted into gold in London without a great loss. There is no doubt that, but for this embarrassment, they could have obtained a price, on more than one occasion, which would have repaid the whole advances, both principal and interest, and even left a margin of gain.

The Liquidators in argument make a great deal of this topic, and say that the offers which were made are, as indications of the value of the investments, of little account; for the real value, they contend, must be measured by the amount of gold they could have got, as the produce of the transaction, when the money was brought home to this country. But I think this argument is based on a fallacy. No doubt it was impossible, except at a great loss to bring home the money

to this country, and it would, of course, have been much more convenient to bring it home, if the doing so had not been attended by such loss. But nobody supposed, that the very exceptional financial condition of the United States, arising out of the war, was to be permanent, or even of any, very long continuance, and still less that the Government would become bankrupt. Now though it was impossible, without great loss, to bring home the money, it was quite possible to invest it in unexceptionable securities in America without any loss The Government securities, and particularly what were called the 5.20 United States bonds might then be purchased at par, and these bonds on maturity were payable in gold. It was a further and most important recommendation of such securities, that the directors were by the contract of co-partnery of the Bank specially authorised, to invest in the 'securities and stocks of the Government of 'Great Britain and Ireland, or of the United States of 'America, or of foreign states.'

The directors did not accept of any of the offers for the purchase of their entire interest in the railways. The precise character and denomination of the securities varied from time to time, according to the exigencies of the railways, and the judgment the directors formed as to the best way of handling for the time the investments which they held. But in the end, *i e*, in 1870, they held, as already mentioned, securities of the nominal value of £974,000 for a debt, principal and interest, amounting to £905,000.

The evidence as to the real value of these securities in 1870 is voluminous and multifarious, and an examination of it has left on my mind a decided impression, that, after many years of anxious and careful treatment of the investments of this portion of the Bank's funds, the directors had got into comparatively smooth water, and were possessed of a property or investment of a sound description.

Certainly this impression is very strongly confirmed by the undoubted fact, that in 1870 the investment began to pay interest, and continued to do so down to the stoppage of the Bank in 1878. The rate of interest indeed varied from time to time, but the average of the eight years was 4 per cent.

Now, it must be remembered that the investment of £905,000, which was thus yielding interest at 4 per cent.,

was composed not only of the money advanced by the Bank, but of all the unpaid interest at a high rate which had accrued due since 1856; and thus this £905,000, which formed in 1870 an important part of the capital of the Bank well secured, included, as one of its component parts, that £311,000 of the Bank's capital which the Respondent is charged with having misapplied by paying it away in dividends. For while a portion of the floating capital in the form of cash or money at call, or the like, was used to enable the Bank to pay dividends corresponding to the amount of the interest due but unpaid on the American railway securities from 1858 to 1870, there was growing up, in precisely the same proportion, an addition to the capital of the Bank in the form of securities for the said interest accumulated with the principal sum of the advances made; the result being that in 1870 the amount of the Bank's capital stood undiminished by the operations complained of.

In judging of the conduct of the directors during the twelve years before 1870, it is also a very material circumstance that the reserve fund provided for by the Company's contract had risen in amount during that period from £15,000 to £260,000. Such a fact is inconsistent with the idea, that the directors were rashly and indiscreetly endeavouring to make their dividends as large as possible, without due consideration for the financial wellbeing of the Bank It is alleged, no doubt, that this large reserve was required and would be absorbed in providing for bad debts of the Bank, unconnected with the American securities. To this, however, it is enough to answer, that if there was such an amount of bad debts at that time, there is no reason to suppose that Mr Mackinnon was made acquainted with that fact or was aware of it.

Hitherto I have not made any distinction between the position and conduct of the Respondent Mr Mackinnon and those of the other directors. But it is only fair to him to notice some circumstances which are peculiar to his case.

It does not appear that he ever made use of his knowledge or influence as a director, to procure any pecuniary or other advantage to himself. It was tacitly admitted, in the course of the arguments, that the greater part of his extensive banking business was done with another establishment; that

any discounts which he obtained from the City Bank were in the ordinary course of business; and that the Bank would have been much benefited if he had been induced to give them more of his custom.

During his tenure of office it appears, that the Respondent gave more of his time and attention to the management of the Bank's affairs than could well be expected from a man engaged in extensive mercantile transactions on his own account In the prosecution of his own business he was necessarily often, and for long periods, absent. But even then he maintained a frequent correspondence with the manager, in which he gave the Bank the benefit of his judgment and experience, to aid them in determining how they should deal with this branch, among others, of their business and investments.

In 1867, having seen some reason—in consequence of the commercial crisis of 1866—to be more cautious than ever in handling securities of this description, he dissuaded his brother directors from continuing longer to place the unpaid interest to the credit of the Profit and Loss Account, and so to include it in the balance of profit for dividend. He was overruled in this; and, considering it to be a matter of opinion and judgment, he acquiesced for the time, but continued to urge his objection periodically till his resignation in 1870

It is stated in Mr Mackinnon's Answers that the system of making large unsecured advances to directors and their friends and partners, which proved the ultimate ruin of the Bank, had not begun while he was a director. This has not, so far as I can see, been disputed either in the evidence or in the course of the arguments

For what took place after 1870 the Respondent is of course not answerable New directors and a new manager came into office between that date and the stoppage of the Bank, and in this liquidation we have only too good reason to know that their management of the affairs of the Bank was of the worst possible description.

After the liquidation commenced, we are informed that the American railway securities were disposed of by the Liquidators at a heavy loss—a loss, if I understand rightly, of more than 25 per cent. To this the Respondent answers, that he

cannot he made responsible for the results He says truly, that the realising of assets for division among creditors is always a very unfair test of the value of the assets, because it must to some extent he gone about hastily, and in a necessarily unfavourable state of the market.

But the Respondent goes further, and contends that the conduct of the Liquidators, in realising these securities, has been such as to liberate him from all responsibility, even if he had been otherwise liable.

In considering this part of the case, it is necessary to keep always in view that. when the Note was presented, Mr Mackinnon had been for ten years entirely unconnected with the management of the Bank; that for six years he had not even been a shareholder, having sold out in 1874; that he was in no way a party in the liquidation; and that the first notice he had of the serious charges and the heavy pecuniary claim made against him, was the service upon him of this Note in November 1880, or of the relative Summons in June of the same year.

In the interval of more than ten years, many important events had taken place. In 1870 the then existing board of directors and the manager took over the railway securities from the retiring director as a good investment, which they thenceforward managed according to their own discretion. As time went on, the management of the Bank became in the highest degree imprudent and even criminal, and ended in ruin and disaster in October 1878. Meantime, the gentleman who was manager of the Bank, while Mr Mackinnon was a director, had died; some of his co-directors had gone out of office like himself; and when the crash came, and the liquidation commenced, the Respondent was apparently no more concerned than any other outside member of the public.

When the Note is served upon him, he learns for the first time, not only that he is to meet a charge of breach of trust going back for a period of more than twenty years, but also that the securities, in dealing with which the breach of trust is said to have been committed, have been realised by the Liquidators at a great sacrifice.

The Respondent says that, if he had had notice, he would have been prepared to relieve the Liquidators of the securi-

ties, hy paying them a price largely in excess of what they ohtained; and he complains that he was not afforded an opportunity of doing so.

He has no occasion to say that the Liquidators, in realising at a sacrifice, did not act for the hest in the interest of the creditors and shareholders—for in a liquidation it is sometimes advisahle to make a sacrifice in order to effect a speedy realisation But he has occasion to say, that that sacrifice ought not to have heen made hehind his hack, especially as the whole responsihility for what was done with these securities prior to 1870 is proposed to he laid on him alone, to the exclusion of those of his co-directors who are solvent, and, it may he, as much answerahle for what was done as he can he.

In these very peculiar circumstances, I am of opinion that the present claim, even if it were on its merits well founded (which I think it is not), is harred hy what has occurred hetween July 1870 and Novemher 1880.

There is only one other question on which I think it right to offer an opinion before concluding—I mean the question, whether the Liquidators have a Title to maintain this claim against the Respondent.

The liquidation has now advanced so far as to shew, that the creditors of the Company will he paid in full, and that a surplus will be left for division among the partners. The Liquidators therefore are suing, not in the interest of creditors, hut of shareholders. But the only shareholders who have any right to the surplus assets of the Company are those who have paid up their whole calls and remain solvent.

The numher of these persons is 208, and the stock which they held at the stoppage of the Bank and still hold is £88,722 Of the total numher of these shareholders 69 acquired their shares prior to Mr Mackinnon's retirement in 1870, and the amount of stock held hy them is £38,324. Those who acquired their shares after 1870 are 139 in numher, and hold stock amounting to £50,395

But a much larger numher of shareholders, heing unahle to pay their calls in full, settled with the Liquidators hy composition, and as part of the arrangement surrendered and assigned to the Liquidators their whole interest in the

Company, representing £757,342 of stock. This stock was held at the stoppage of the Bank by shareholders who acquired it before 1870 to the amount of £337,227; and to the amount of £420,515 it had been acquired (by those who held it at the stoppage) after 1870. A considerable amount of the stock was held at the date of the stoppage by or for behoof of the Bank itself.

The enquiry at once presents itself, What are the Liquidators to do with the £311,000 demanded from the Respondent, when they get it into their hands? Are they simply to distribute it among the remaining solvent shareholders, according to the amount of their shares? The result would be, that those shareholders who got their full share of the capital of the Company improperly paid away in dividends, would receive payment of these dividends a second time in whole or in part. But all could not expect to receive an equal amount; for some have profited by the unlawful dividends to the full extent of twelve years' dividends, while others may have only received such dividends for one or two years. In any view, therefore, some of the solvent shareholders would be entitled to no part of the £311,000, having received their full share of it already, others might be entitled to a full share of it corresponding to the amount of their stock, and others might be entitled to a proportionate share varying in amount according to the precise date of their acquiring their stock between 1859 and 1870.

These considerations suggest three serious objections to the title of the Liquidators to recover the sum which they demand from the Respondent:—1. It is clear that they are asking a great deal more than they can justly dispose of, 2. They have not shewn, and probably cannot shew, how much they could justly dispose of; and 3. Such a demand is plainly not within the meaning of the 165th section of the Act of Parliament.

But there is a still more serious, and, I think, a fatal objection to the title of the Liquidators to insist in this demand. Every shareholder of the Company for the time received his share of each of the dividends said to have been unlawfully paid, and so each share of the Company's stock received just

as much of these dividends as every other share. Now, a purchaser of shares in such a Company takes precisely the place of the seller, and cannot ask for himself a participation in any advantage of which his author has already received the proportion corresponding to the shares sold. This proposition, which seems to me sound in general principle, receives very strong support from the 33d article of the Bank's Contract of Copartnery, which provides that every person acquiring shares, whether by inheritance or purchase, 'shall take and assume the place and liability of his author, 'ancestor, or other cedent, and become subject to all the 'obligations incumbent on him.' If the shareholder who received payment of a dividend out of capital is to have the improperly divided capital replaced, in order that, in the liquidation, he and his copartners may have the replaced capital divided among them rateably, then he must repay the dividend improperly paid and received; and his assignee or successor, who has 'become subject to all the obligations 'incumbent on him,' must fulfil the obligation to repay the dividend. His claim, therefore, is barred on the principle '*Frustra petis quod mox es restituturus.*'

Such being the position of those who are now practically the only constituents of the Liquidators, for whose benefit alone they will now administer the estate in liquidation, my opinion is that the Liquidators have no title or legitimate interest to insist in their claim against the Respondent, Mr Mackinnon.

I am for refusing the prayer of the Note for these three reasons:—

1. That the Liquidators have, at this stage of the liquidation, no title or legitimate interest to maintain the claim they make.

2. That the claim is barred by lapse of time, combined with the action of the managers and directors of the Bank between 1870 and 1878, and the conduct of the Liquidators in dispos-

ing of the railway securities, without any communication with the Respondent, or notice to him.

3. That there is an entire failure to establish, that the Respondent was a party to any proceeding, which can properly or fairly be described as paying dividends out of capital.

Lord Deas.—The contract of the City of Glasgow Bank was entered into early in the year 1840. The original capital of £750,000 was increased in 1843, under powers conferred by the contract, to £1,000,000, divided into £10 shares, which were converted in 1860 into consolidated stock. The Bank suspended payment on 11th November 1857, but was resuscitated at a general meeting of the shareholders on 31st December of the same year. The Bank then carried on business till October 1878, when it finally stopped payment, and its affairs were agreed to be wound up by voluntary liquidation, under the supervision of the Court. The supervision of that liquidation entailed upon your Lordships of this Division much laborious duty of a painful nature, not only as regarded the ruin of many innocent shareholders, but also as involving the punishment and degradation of those directors whose malversations in office contributed directly and largely to the lamentable result.

The present case arises out of an earlier period of the Bank's history, and the liabilities sought to be vindicated in it are solely of a civil or pecuniary description. They are however very large, and the case is, on that account, as well as for other reasons, one of great anxiety and importance. The proof adduced, documentary and parole, as to the nature of the transactions sanctioned by the directors, and for which the defender, as the only solvent director, is sought to be made responsible, is extremely and unusually voluminous. The able pleadings on both sides of the bar, before and after the leading of that Proof, have been proportionally extensive, occupying weeks of judicial time; and it would be altogether impracticable for each of us, I may say for any one of us, to travel over the whole in detail. I shall not attempt to do so, but rather to state the conclusions at which I have arrived, and where my chief difficulty has lain, and still lies, in regard to one or more of the conclusions which have been reached

The proceedings have assumed a shape which can hardly be reconciled with strict judicial rule, and which I find to be considerably embarrassing in endeavouring at this stage to form and express an opinion upon them.

The Note now before us was presented by the Liquidators in November 1880. In that Note a general narrative is given of the Bank's transactions with certain American Railway Companies, but the substantive matter of complaint in the Note is (Article 29), that in the accounts kept by the Bank with these Railway Companies, as entered in the Bank's books, the directors of the Bank had for the year ending in June 1858, and for each of the subsequent years down to and inclusive of the year ending in June 1870, debited the railway companies with large sums of interest, amounting in whole to £315,897, 7s. 8d., and had paid these sums half-yearly to the shareholders of the Bank as dividends, while, except to the amount of £4230, 10s. 11d., no part of said interest had been actually received by the Bank, and the railway accounts referred to had all along remained unproductive.

This the Liquidators have alleged was equivalent to payment of dividends out of capital, and on this footing the Note concludes by craving 'decree against Mr Mackinnon for '£311,666, 16s. 9d., or such other sum as shall be ascertained 'to be the amount of the interest debited to the accounts in 'the books of the said City of Glasgow Bank, titled "Railway 'Debenture Account" and "Railway Stock Account," and paid 'away as dividend in accordance with the reports of the 'directors of the Bank.'

Shortly before presenting this Note, the Liquidators, in June 1880, had raised an Ordinary Action against Mr Mackinnon, which is now in dependence in the Outer House. In that action, besides making, *in verbatim*, the same terms as in the subsequent Note, the claim for interest said to have been improperly paid away as dividends, the Liquidators have libelled a different and additional ground of liability against Mr Mackinnon, viz., that while he was a director of the Bank there had been expended certain large sums of money, beginning with the purchase of mortgage bonds over the Racine Railway, and when these were found to be inadequately secured, then much larger sums in constructing, from time to time, extensions of that Railway, until it ulti-

mately became, what had been contemplated by the original projectors, viz, a continuous line between the two great termini of Racine on the east, and Port Byron or Savanna on the Mississippi on the west. This expenditure the Liquidators alleged in their Summons and Condescendence was a breach of duty by the directors of the Bank while Mr Mackinnon held office; and as the whole securities and property thus acquired by the Bank had, when realised by the Liquidators, under the present liquidation, produced less than the amount expended for them by £122,565, 2s. 8d, the Summons concluded against Mr Mackinnon for that sum, with interest at 5 per cent. per annum from 22d October 1878, till paid.

What is called an Unclosed Record was prepared in that action by Condescendence and Answers, in which the parties, besides embodying what I have mentioned as to the matter of interest and dividends, have set forth, more fully than in the Note and Answers, all their averments as to the Bank's investments in and connected with the said Racine Railway and its extensions. The voluminous Proof which has been adduced, documentary and parole, has been directed to the whole averments thus made by the parties respectively in the Ordinary Action as well as in the Note. The discussions at the bar, as the printed notes shew, have also been applicable to both claims against Mr Mackinnon, viz., the claim for £122,565, 2s. 8d. of damages in respect of loss upon the investments and purchases, and the £311,666, 16s 9d. of interest applied in payment of dividends when that interest had not been actually received by the Bank.

It seems to me, therefore, incumbent on us, at this stage of the liquidation, and with a view to facilitate its further progress, that we should now express our views, tentatively at least, upon each of these grounds of liability, deciding them only in so far as we may be agreed that they are ripe for decision.

The natural order in which to deal with these two claims seems to be to take first the more general question,—although not involving the largest amount of pecuniary liability—I mean the question how far the investments by the Bank in and connected with the line, or rather lines of railway, from Racine to Port Byron or Savanna on the Mississippi, were or

were not breaches of trust on the part of Mr Mackinnon and his co-directors, inferring liability on his part for the difference between the amount expended by the Bank on these investments and the price realised for them when sold by the Liquidators.

This question must be judged of altogether under the circumstances in which Mr Mackinnon found himself placed when the expenditure said to have constituted a breach of trust on his part was commenced, and afterwards continued and increased. The opinion which may be formed on that question, in these circumstances, can be no precedent or authority for forming a similar opinion where the circumstances may be different. It will be kept in view that large advances had been made by the Bank to the Racine Company both before the Bank suspended payment temporarily in November 1857, and after it had been resuscitated by the shareholders in December of that year. These advances had begun as early as 1856-1857 and the beginning of 1858, and they left a sum of upwards of £117,000 due to the Bank in February 1858, for which the Bank had virtually nothing to look to but the credit of the Racine Company, which the Liquidators say in their Note (Art. 16) was then in embarrassed circumstances, and unable to pay the interest on its bonds

In like manner, in Article 21 of the Unclosed Record in the Ordinary Action, the Liquidators make the following statement:—'In February 1858 the Racine Company was 'in embarrassed circumstances, and unable to pay the interest of its bonds. The second part of the line was formed 'to the extent of only one-fourth. The Company had meantime made an issue of 700,000 dollars of bonds over that 'part, and had contracted with Mr George A. Thomson, 'stockbroker, London, afterwards of New York, to place the 'said bonds, which he had failed to do. The Bank on the 'security of 163 of these bonds, of 1000 dollars each, and a 'promissory note for £20,700 by the president of the Company (Mr Durand), had discounted drafts of Thomson upon 'Watson & Company of Glasgow to the extent of £20,000. 'Thomson and Watson & Company were quite unable to 'pay, and the Racine Company had no prospect of meeting 'their presideut's promissory note at the time it fell due on 'the 29th April 1858. The promissory note was accordingly

'dishonoured, and a month later an arrangement was made 'under which it was handed back to the Company in ex-'change for 194 more bonds of 1000 dollars each, over the 'second part of the line.'

All this, it will be observed, was before Mr Mackinnon became a director of the Bank, which he did not do till 5th July 1858. The question which, in these circumstances, necessarily presented itself to the mind of Mr Mackinnon, when he accepted the office of director, was—What was he to do?

To lose the debt of £117,000 due by the Racine Company would obviously infer the ruin of the Bank. The Racine Company, and consequently the Bank as creditors of that Company, were in a state of embarrassment apparently inextricable by any ordinary means which could have been adopted; and for this state of matters, whoever had been to blame, it was not Mr Mackinnon. The ship was overweighted and ready to sink. A large unsecured debt, like an ill-omened albatross, hung over her, and unless some one of unusual energy, and whose motives were at the same time above suspicion, could be called in aid to right her, the vessel must be abandoned.

The choice, so far as appears, was limited to one of two courses. Either to restore the credit of the Racine Railway Company and to endeavour to make the line a paying concern, or, with or without the sanction of the Court, to convene another meeting of the shareholders—to recal the former resolution—and resolve to wind up the affairs of the Bank. I am not surprised that this latter course did not commend itself to the mind of Mr Mackinnon and his co-directors as one which they should bring under the consideration of the shareholders of the Bank, or that they did not think it likely to meet with their approval when he was appointed one of these directors in July 1858. It was only seven months since the question of going on or winding up had been before the shareholders, and had been determined in favour of going on. Additional advances had been made by the Bank on the credit of the Racine Railway Company between the date of that resolution and the date of Mr Mackinnon's appointment as a director, and I see no reason to think that the shareholders of the Bank would have been desirous or willing to stop short

and pocket a heavier loss in July 1858 than they were willing to do seven months previously, in December 1857. I think, on the contrary, their resolution of the latter date to continue the business of the Bank could not, in the circumstances, be regarded otherwise than as an indication to the directors of July 1858, that they were expected to continue and carry out the system of advances by the Bank to the Racine Railway Company till the object of these advances should be effected—viz., that of restoring the credit of that Company and rendering all previous advances safe and available to the Bank. This was obviously the object which Mr Mackinnon and his co-directors of 1858 had in view in the course which they adopted.

They did not, however, enter upon that course, by making farther advances, either rashly or rapidly. Their first advance seems to have been limited to £884 to purchase a large quantity of tools and rails of which the Railway would otherwise have been despoiled by a sale under a Sheriff's warrant at the instance of creditors holding a judgment for 4000 dollars against the Company. Their next step was to acquire a considerable additional amount of mortgage bonds in order to have the means of preventing hostile creditors from adopting separate measures and effecting foreclosures, &c. Up to 1859, however, the Bank were the holders of mortgage bonds or other securities only, and no stock of the railway. But the directors were now brought face to face with the question, Whether they were to promote an extension of the line, or lose all the advances they and their predecessors had hitherto made.

It had at no time been supposed that the line would prove a paying concern as a short or local line. The charter was for the construction of a Railway between the two great physical features and trade centres of that part of America —Racine on Lake Michigan on the east, to Savanna on the Mississippi on the west. The line was first made from Racine to Davis, a distance of about 90 miles, and the Company were engaged in constructing it further to Freeport, at an expense which would be in all $586,000 between Racine and Freeport, when the Bank directors were recommended by Messrs Irvin & Thomson, and other reliable correspondents in America, to aid and promote the extension of the line to Freeport, in the

hope that this would improve the value of their securities over that part of the line already made. The advice was adopted, and Freeport, which is 104 miles from Racine, was reached in September 1859 The effect upon the traffic of the extension to Freeport was somewhat disappointing, but this only increased the urgency of farther steps in the same direction I shall not, however, pursue this detail any farther, because the vindication of the policy pursued by Mr Mackinnon and his co-directors is to be found, I think, in the state of matters as he found them when he became a director in July 1858, and for which, as I have said, he was in no degree to blame. Was it a breach of trust on his part to sanction the expenditure, which he did on coming into office, in the hope of recoping losses previously sustained? If that question be answered in the negative, as I think it must be, none of the advances made with the same object, while he was a director, can be stamped as breaches of trust, and for which he is to be held personally liable.

They were all the natural sequence of each other. Nor were any of them bestowed upon a hopeless undertaking. I have already noticed the advantageous position of the termini of the Railway The splendid country through which it was to pass—fertile to begin with, and as likely to be studded with towns and villages as the prosperous Illinois Railway, which crosses it at Freeport. In short, in place of there being a loss, the prospect of large profit to the Bank was likely to be realised, and in all probability would have been so had a number of adverse circumstances, which nobody could have foreseen, not combined in the end to frustrate that prospect One of these has been the fact that from causes with which Mr Mackinnon had nothing to do, the Bank was compelled to go into the present liquidation before its transactions with these American Railways were or could have been wound up, and the Liquidators have felt it not consistent with their official duty to delay the realisation of the Bank's investments, connected with these Railways, till prices and credit had revived which they have done remarkably and speedily, and by which loss to all parties might have been ultimately avoided.

Moreover, I must say that although the Liquidators may not have been legally bound to give notice to Mr Mackinnon of their intention to dispose as they did of the Bank's se-

curities and investments connected with these railways, it is unfortunate that it did not occur to them to do so, as he would thereby have had an opportunity of paying in full the claims of the Liquidators (which he had ample means of doing if inclined) and of taking over the whole American assets, and retaining them till they could be realised to advantage, which subsequent events have shewn they might have been within no long period after the Liquidators (conscientiously, I have no doubt) considered it to be their duty to dispose of them.

As to the encouraging prospects which were all along held out to Mr Mackinnon and his co-directors to persevere in their efforts for the extension and completion of the railway, and the apparently trustworthy nature of the recommendations they received to do so, I have not dwelt on these points, because they have been fully gone into by your Lordship in the chair But it is particularly noteworthy to remark that some of the later extensions were those which proportionally added most to the traffic and to the surplus income afforded at different periods by the railway.

Upon the whole, as regards this part of the case—I mean the claim of the Liquidators for £122,565, 2s 8d. as the sum by which the price obtained by the Liquidators fell short of the expenditure by the directors of the Bank, in investments connected with the railway or railways in question, as at 22d October 1878—the opinion I have formed is altogether adverse to the success of that branch of the Liquidators' claim.

There remains only the shorter, but, as regards amount, the much larger question—viz, the claim of the Liquidators against Mr Mackinnon in respect of money paid away as dividends from June 1858 to June 1870, both inclusive, as set forth in Articles 27 and 28 of the Note, as well as in Article 26 of the Condescendence in the Ordinary Action The money thus applied in payment of dividends is represented by Mr Mackinnon and his co-directors to have consisted of interest duly earned upon two of the American railway accounts, and periodically debited thereto accordingly So far this is not disputed by the Liquidators. But they remark that, while the interest so debited during the twelve years mentioned, and treated as profit, amounted in whole to £315,897, 7s. 8d., the payments actually received to account of that interest amounted only to £4,330, 10s 11d, leaving £311,664, 16s 9d. of a deficiency

for which the Liquidators hold Mr Mackinnon personally liable

It appears to me that the defence against this branch of the claim is, or might have been, in some aspects of it, attended with much more difficulty than the other.

Payment of dividends out of capital (which this is said in substance to have been) may be so palpably contrary to the duty of directors, that they shall not be heard to allege *bona fides* as a defence against it. Here the adventurous appropriation of unpaid interest to the payment of dividends went on half-yearly for no less than twelve years. I do not doubt that Mr Mackinnon and his co-directors believed that the interest for all the years in question would be recovered in the end; nor do I doubt that they had reasonable grounds for believing so, but I have great difficulty in seeing why the directors, however much they expected and believed that all the interest would be so recovered in the end, should have done that which they might have left undone—namely, paying the dividends for so many terms, in place of waiting till they had first received the interest out of which they were to pay them. I should be sorry to see the course adopted drawn into a precedent—and I hope it may prevent it from being so—that, although it may not lead to personal liability in this case, it must be seen to have been sufficiently perilous as to make it rather a danger to be avoided than an example to be imitated.

One answer, which undoubtedly deserves serious attention, was made to it by Mr Robertson in his very able address for Mr Mackinnon (Notes of Discussion, page 125, bottom, and 126, top, as indeed all the addresses were extremely able) —viz., that in 1870, when Mr Mackinnon ceased to be a director, there was presented to and in the hands of the Bank (securities included) property equal in value to the whole principal and interest advanced; and I do not doubt that this may have been so had that property been realised in prosperous times, and in a favourable market. But all answers of this kind leave the difficult question behind, Who shall bear the burden if times are not prosperous, or the markets are unfavourable?

There is one answer, however, to this branch of the claim of the Liquidators which I confess has all along appeared to me to be insuperable. That answer has, amongst others,

been stated by your Lordship, and it arises thus :—The shareholders were, of course, the parties who received the dividends in question. The debts of the Bank have all been paid ; and the Liquidators represent shareholders only ; but in that capacity they have no title to sue for these dividends any more than the shareholders themselves, who have already received them.

In conclusion, I must observe that whatever opinions may be formed as to the legal questions involved in this case, it is a great comfort to find that there is no trace throughout of any interested or selfish motive on the part of Mr M'Kinnon in what he did or concurred in doing. He never made the Bank in any way a convenience to himself or his friends, as we know to have been done by other directors at a later period of the Bank's history. The answers which Mr Robertson made to some of my questions on this subject at page 108 and elsewhere of the printed notes of the discussion were made in the hearing of the Liquidators and their counsel, and not the slightest doubt has been attempted to be thrown upon the accuracy of any of them. I may just read the passage I refer to.

' Lord Deas.—Let me understand. He required discounts ' in the course of his trade, but you say that he did not get ' above one-tenth of what he got from banks generally.

' Mr Robertson.—Yes.

' Lord Deas.—Then I understand you to say that he had no ' accommodation of any other kind from the Bank

' Mr Robertson.—That is so.

' Lord Deas —And you said something about none of his ' relations having obtained accommodation.

' Mr Robertson.—There is nothing of that kind in the case'

I am sensible of the imperfection of the brief observations I have now made on both branches of this voluminous and important case. But any one who reads the printed Notes of the Discussion—interspersed, as they are, with observations from the Bench—will not fail to see that we all followed that discussion, and appreciated its object and value, however briefly we may have found it necessary or practicable to resume the details of it here.

Lord Mure.—In dealing with the merits of this very serious claim, it is important, I think, to keep in view that, under the Note as laid, no question is raised as to the power of the directors of this Bank to advance money upon securities in America. The claim is not one for repetition of capital alleged to have been illegally invested in such securities. That question is, as I understand, made the subject-matter of a separate action, to which reference has been made during the discussion, but which we are not at present called upon to decide. The Note as laid, on the other hand, proceeds upon the assumption that the investments in America, on which it is alleged no interest was paid at the time it was taken credit for, were within the power of the directors of the Bank to make, and the complaint is, that those investments, being thus unproductive, and no interest having been remitted to this country or received from them in America, beyond a comparatively small amount, the directors, from 1858 to 1870, and among them the Respondent, allowed the amount of this interest to be carried to the Profit and Loss Account in framing the balance-sheet for the year, and allowed a dividend to be declared on the footing that the interest had been received. And it is maintained that by so doing the Respondent was 'guilty of a breach of 'trust in relation to the Company,' for which he is liable in repetition, under the 165th section of the Statute of 1862, to the extent of about £300,000, being the amount of capital or other funds of the Bank alleged to have been so misapplied in payment of dividend from 1858 to 1870.

In answer to this demand, the Respondent, while he admits that the interest on the American advances had not been remitted to this country at the time the yearly balance-sheets were framed, denies that these interests had not accrued. He, on the contrary, alleges that those interests, in each of the years during which he was a director of the

Bank, had been earned, and were due at the time the yearly balance-sheets were prepared; and that, although they had not been actually paid, and become available as cash in hand at the time, they were all along admitted by the debtors to be due; and that securities in the shape of bonds over the railways, or of railway stocks, were from time to time received more than sufficient to cover the amount of money advanced, and the interest due upon those advances. The Respondent also alleges, that where interest is due, but is not actually available as cash in hand, it is in accordance with the custom of trade, and with mercantile usage, to carry such interest to the Profit and Loss Account for the year in which it is due, and to calculate the profits on that footing; and he maintains that this is not paying dividend out of capital in the sense of being a breach of trust in relation to the Company, provided that interest is believed to be properly secured. And the Respondent further alleges that, when he left the board of directors in 1870, he believed the American railway securities belonging to the Bank formed a sufficient cover for the advances made in America up to that date, and also for the whole interests due on those advances, and that he had good grounds for that belief.

Such being the general nature and substance of the question at issue, the broad leading facts on which its solution mainly depends, appear to me, notwithstanding the great bulk of the evidence adduced, to lie within a comparatively narrow compass, and are substantially as follows —

Before the Respondent became a director of the Bank in 1858, the Bank had made advances to parties in America to the amount of about £117,000, as against which they held the security of mortgage bonds of the Racine and Mississippi Railway Company, of the nominal value at par of about £141,000. The debtors in those advances were quite unable to pay them, and the bonds could not at the time be realized, as the line was still in the course of formation merely, and not likely to make any return for some time to come.

In these circumstances it became a matter for anxious consideration, by the board of directors, what course should be adopted to secure these advances. No one proposed that this large sum should be written off as a bad debt. The Committee of Investigation, which had been appointed to report upon

the position of the Bank at the time it had suspended business in 1857, did not recommend that course; and the directors were advised by parties of reputation, and great commercial knowledge and experience in America, that in the circumstances in which the railway was then placed, the best if not the only way to prevent that large sum of money from being lost, was to contribute along with the other bondholders in making further advances towards the completion of the line of railway to Freeport, and so on to the Mississippi. This, after full deliberation, the directors resolved to do, and for these advances with the accrued interest thereon they received mortgage bonds.

On the completion of the line to Freeport some difficulties seem to have arisen with other railway companies as to its continuation; and after further anxious consideration of the advices received from America on the subject, the directors of the Bank, of whom the Respondent was one, came to the conclusion that it would be necessary to make further advances towards the completion of the line to the Mississippi. It was represented to them by their advisers in America, that although the value of the line had been much increased by its extension to Freeport, its continuation to the river was absolutely necessary in order to develope the line, and so to render the railway securities available for disposal in the market within a reasonable time. On this advice the directors acted, and arrangements were made under which a Company, called the Northern Illinois Company, undertook the completion of the railway to the river. Towards this object the directors made further advances on the security of the Northern Illinois Company's mortgage bonds and stocks, which they were advised were amply sufficient to cover those advances. And they also came to the resolution, in the absence apparently of the Respondent, in the year 1864, to allow the interests which had accrued, and were to accrue, on the Northern Illinois bonds, to be lent to that Company on mortgage bonds, or on stocks of the railway, with a view to an extension of the line to Port Byron. That was accordingly done, and the line was in this way completed about the year 1865.

For all the money so advanced, and for the interest which had accrued, the directors received bonds or stock of the

Northern Illinois Company, which were exchanged for the Western Union Company bonds or stock, on the consolidation of the Racine and Mississippi and Northern Illinois Companies into the Western Union Railway Company, in 1866.

After this consolidation arrangement, matters seem to have remained in substantially the same state till the Mitchell agreement was made in 1869, although, in the intermediate time, some abortive offers appear to have been made for the acquisition of the Bank's interest in the line. Under that agreement there was a reduction and rearrangement of the respective quantities of mortgage bonds and stock in the line, which has been the subject of a good deal of adverse observation. But, upon the whole, it appears to me to have been, in the circumstances, a fairly satisfactory arrangement, and under it matters remained till the Respondent ceased to be a director of the Bank in 1870, and until the Bank stopped payment in 1878

Under that agreement, interest began to run upon the bonds at 3 per cent. for three years from 1st January 1870, and from 1873 at 7 per cent.; and from 1873 to 1878 there was remitted to the Bank interest amounting, on the average, to £40,000 a-year—the remittance in 1878 being £41,585, and in 1879 £42,000—being at the rate of 4½ or nearly 5 per cent. on the £900,000 which had been advanced on American securities, and had it not been for the failure of the Bank, and the consequent necessity of almost immediate realisation, there is no reason to suppose that that remittance of interest would not have been continued

At the time when the Respondent ceased to be a director, the securities, of one kind and another held by the Bank, amounted at par, according to the Vidimus prepared by the Liquidators (Print D, page 991), to £980,866, while the amount of the advances (as on page 995) was £905,166, leaving a surplus of £75,700 According to State A A, also prepared by the Liquidators, these securities amounted to £974,866, leaving a surplus balance of £69,700, after deducting advances; while, according to State C given in by the Respondent, the securities amounted to a considerably larger sum—viz., £1,053,935, leaving a surplus balance, after the same deduction, of £148,769 This difference arose from the

Respondent having taken into calculation, under the heading of Racine Warehouse and Dock Company stock, certain sums which are not included in the Liquidators' State, and which I am disposed to think he was entitled to do

It further appears from each of these States—viz., A A and C, that during each year, from 1866 to 1870, the securities held by the Bank, taken at par, were much more than sufficient to cover the principal and interest on the whole advances And that such was believed to be the position of matters by Messrs Irvin & Company, who acted for the Bank in America in taking these securities, is plain from the evidence of the two partners of that firm, who were examined on commission in America, and has a very important bearing upon the question. Mr Wetmore, who was a partner of Mr Irvin's house at the time, and is now treasurer of the International and Great Northern Railway, is asked (p. 463 of B) to state 'what were the relations from 1859 to '1866 of the Bank and this railway account in regard to the 'earning and realisation of interest upon the outlay of the 'Bank?' and he says—'The Bank owned the securities, and 'as interest matured on these securities it was put into 'other securities,' which, 'as far as the Bank was concerned, 'were new investments' He is then asked to state 'what 'kind of securities the interest was invested in which was 'collected in behalf of the Bank from 1859 to 1866?' and the answer is, 'From 1859 on Racine and Mississippi bonds. As 'interest matured and the plan of reorganising or issuing 'Western Union securities for part of the coupons of 'Racine and Mississippi was adopted, they received Western 'Union Bonds, part Western Union stock, and part Western 'Union preferred stock, and in some cases they received 'Northern Illinois bonds, which afterwards went into 'Western Union bonds; eventually they received Western 'Union securities for all of that interest,' and he adds (p. 464), in answer to another question, that 'the whole of the interest 'which fell due upon the securities from 1859 to 1866 was paid 'to the Bank;' and a similar answer is given (at p 466) with reference to the interest falling due, and collected from 1866 to 1869.

Mr Irvin is examined on the same matter, and he states in answer to a question put to him in cross-examination

(p. 484), 'The securities taken for interest were new and 'fresh securities. When the Western Branch of the Racine 'and Mississippi Railroad and Northern Illinois Railroad were 'being constructed, the amounts received for interest were 'invested in the new securities on those roads, and were ex- 'pended on their construction. When the Western Railroad 'Company was organised it included all the former organisa- 'tions, and all the securities then held were exchanged in 'bulk for the securities of that organisation in bulk. After 'the organisation of the Western Union Company in 1866, 'until the Bank's agent came out in 1869, the proceeds of 'the interest were invested in preferred stock of the Western 'Union Company, according to my best memory.'

So standing the facts, the question to be disposed of is this—Does the mode in which the Bank dealt with the interest on these securities during the period embraced in the Note, viz., by carrying it to Profit and Loss Account in this country, while investing it as capital in railway securities in America, amount to a payment of dividend out of capital, or is it, on the other hand, to be looked upon as being substantially an investment on American securities of the interest which had accrued there, but which could not then be made available as cash for transmission to this country?

I am of opinion that it is not, in any just sense, a payment of dividend out of capital, but an investment of the interest in America as part of the capital of the Bank.

By so dealing with the matter, the interest which had accrued, but which the railways could not pay in cash at the time it fell due, was, in my opinion, paid in money's worth in the shape of these mortgage bonds and stocks which were taken in lieu of the payment of it as it accrued; and the interest was in this way secured as part of the Bank's capital in America. So that the amount of money carried to profit and loss in this country as interest in each year, did not operate as a diminution, either permanent or temporary, of the capital of the Bank, which it is essential that it should have done in order to subject a director acting in complete *bona fides* to the serious, even in certain circumstances criminal, charge of paying dividend out of capital; and it did not so operate for this plain reason, because a sum corresponding in amount to that carried to profit and loss

as interest, was invested in America in substitution, and as a *surrogatum* for the money taken from the Bank in this country when the dividend was paid. This was substantially, therefore, an investment of capital in America, and if done in the *bona fide* belief that the security was sufficient, constitutes a good defence to the present demand.

Now upon this question of *bona fide* belief the evidence is all one way. The Respondent's own evidence on this is clear and distinct, both in his examination in chief and when pressed in cross-examination; and I may observe that I never read evidence given apparently in a more fair and full and frank manner, carrying truthfulness on the face of it. He says (p. 195 of A), that his anticipation, when he left the Bank in 1870, was, that all the money which was 'at 'the debit of the account in the Bank, including in- 'terest, would be realised if the securities were pro- 'perly dealt with and handled;' and that his colleagues and the manager of the Bank concurred in that view. 'They always relied on the stock. They relied on Mitchell 'owning part of the stock as giving a high value to our part of 'it,' and he, on being further pressed, says (p. 199)—'I always 'thought that the securities we had in hand, and which we 'were getting from time to time, were amply sufficient to cover 'the whole amount of principal and interest thereon, and 'that ultimately these would be realised in full to cover 'everything,' and there are other passages to the same effect. And he had, as it appears to me, sufficient grounds for this belief, as explained by himself, and particularly the advice and opinion of the gentlemen in America who were consulted by the directors on the subject. Mr Wetmore, for instance, to whom I have already alluded, says when asked this question (B, p. 464)—'When such interest was so paid and 'invested, what was the expectation of the Bank and of 'your house in respect to the value of the new securities in 'which they were put, and your expectation of realisation of 'cash upon the same?' And the answer is—That the 'securities would realise enough to pay all the advances 'and interest;' and we 'considered that the directors of 'the Bank were justified in debiting the railway accounts 'with the full amount of the coupons so collected and 'so invested,' and he adds, in answer to another question,

'that their firm had full confidence that the securities were 'sufficient' Similar evidence is given by Mr Irvin on this point He is asked (B, p. 482) 'to make a full statement in 'respect of the collections of interest upon the Bank's invest- 'ment in railway securities, and what disposition was made 'of such collections,' and he answers—'I am not able to 'state particulars of these collections. But they were col- 'lected and invested in new securities on the Bank's account 'I and my firm and the Bank, as far as we knew, considered 'these new securities to be solid investments, and sufficient 'to make good the advances based upon them. We also 'considered that, in the circumstances, the directors of the 'Bank were justified in debiting their railway accounts with 'the amount and value of the coupons This opinion was 'based on the estimate of the ultimate value of the Western 'Union Railway property, believing it would make good the 'Bank's advances, and accumulated interests thereon.'

As against this evidence, which is confirmed by other witnesses, and among them by Mr Thomson and Mr Hall, there is no equivalent evidence adduced by the Liquidators But they point to their own realisation of the securities in 1879, which fell short of the gross sum against which the securities were held by £300,000, and rely upon it as shewing that the securities were then insufficient, and that a loss has to that extent been sustained. But that is not, as I humbly apprehend, any answer under this Note to the defence maintained, and which is, I think, substantiated on the part of the Respondent. If I am right in holding that the transaction under which these interests were invested in America was in each year a *surrogatum* for the sum applied in payment of dividend in this country, and that this was all done in perfect *bona fide*, and in the well-grounded belief at the time that the securities were a good investment, the case is then taken out of the category of cases of payment of dividend out of capital; and, if that be so, it appears to me to be altogether beside the question to say that the securities ten years afterwards turned out to be, in some respects, an insufficient investment. That may or may not be made the foundation of a claim against the Respondent, and the other directors, for an illegal or insufficient and improper investment of the funds, as beyond their powers under the contract of copartnery, such as I alluded to at the outset of this opinion; but it is not, as I

conceive, a relevant answer to the defence which has, I think, been here established on the part of the Respondent, that, at the time he ceased to be a director of the Bank in 1870, he never had been guilty of any breach of trust against the Company, by paying dividend out of capital, with which alone he is charged under this Note.

This observation would, I think, in such circumstances, be well founded with reference to any ordinary case, where a loss might arise on ultimate realisation through an unfortunate investment But this is, in many respects, no ordinary case, and the loss on realisation arose from no fault on the part of the Respondent. It has arisen under a liquidation rendered necessary by the culpable and reckless, and in some respects criminal mismanagement of the affairs of the Bank, begun after the Respondent had ceased to be a director; and a careful examination of the evidence bearing on this part of the case, has left a strong impression on my mind, that if the realisation had not been forced on by one of the greatest monetary catastrophies that ever occurred, no loss would have been sustained. And I think there are also pretty strong grounds for holding, that if the realisation had to be made now, there would not only be no loss, but a considerable profit in the result I am not disposed to attach the slightest blame to the Liquidators for the way in which the realisation was conducted, and I believe they did the best they could in the difficult position in which they were placed But they were in the position of parties who required to realise as speedily as possible a very large amount of bankrupt estate. Now such estate proverbially sells cheap, and there is generally a loss on realisation, owing to the purchasing world being aware that it is the duty of the Liquidator, or trustee, as the case may be, to endeavour to realise with despatch. The evidence of Mr Harding, a gentleman of great experience in such matters, is very decided upon this point. He says that, according to his experience, there is in liquidation (A, p 214) 'always a large per-'centage of loss in realising, unless the securities are every-'day of marketable value. If they are exceptional securities, 'in my experience an unusual loss is realised,—liquidation 'being adverse to favourable realisation.' And in such a case as the present, where the securities were in some respects exceptional, he rates the loss at 25 per cent, which

appears to he just ahout the loss that was here sustained One item of loss which may he referred to as confirmatory of Mr Harding's view is the loss that was sustained in the sale of the Western Union stock of the Bank. For that stock, which had not hegun to pay any regular dividend in 1870, the Bank refused an offer of £130,000 at that time. In 1879, by which time the line was paying a small dividend on their stock, the Liquidators were obliged to dispose of it for £5000; although, for the other half of that Western Union stock, Mr Mitchell, a short time after he acquired it in 1870, managed to realise about £240,000.

A good deal of argument was addressed to us on the suhject of certain offers which were made to the Bank for the purchase of their interest in the railway, more particularly after the consolidation of it into the Western Union Railroad, and on the conduct of the Bank in declining to accept any of these offers, which it was said would have probahly very nearly cleared the Bank. It is very easy to throw doubts on the policy of the Bank in this respect, with the light which has now heen thrown upon it; but after giving the matter the hest consideration in my power, it appears to me that the main ground on which the Bank, as I understand it, declined to close with them—viz., that the state of the money market and of the rates of exchange was at that time such as to render it impossihle to realise and remit the money to this country except at a very considerable loss, was sufficient. One inference, however, which is to be deduced from the number and amount of tbe offers made from 1866 to 1868 is, that the securities in question were not so worthless in the opinion of monied men in America, and of railway companies there, as they have heen represented in these proceedings, and another inference is, that the loss sustained in realisation in 1879 was due to exceptional causes, and chiefly to realisation under liquidation, and did not arise from the inferior quality of the securities The loss, therefore, on realisation is, in my opinion, no evidence in this case, that the investments were not sufficient in ordinary circumstances to cover the advances.

Upon the whole, therefore, on this hranch of the case, I am very clearly of opinion that the Liquidators have failed to instruct that the dividends in question were paid out of capital, or that any misfeasance or hreach of trust in

relation to the Company has in any way been committed in the sense of the 165th section of the Statute.

On the preliminary questions, I entirely concur with the views of your Lordship in the chair.

I think the plea that the demand comes too late is well founded. The Respondent left the directorship of the Bank in 1870, and from that time to the stoppage of the Bank, no hint or surmise was ever made against his conduct in the directorship. Till the stoppage of the Bank in 1878, the Bank were for six years in the receipt of large sums of money—£40,000 a-year—the proceeds of some of these securities, which were annually divided among the shareholders of the Bank, and seemed thus to have deliberately accepted those securities as part of their property, yielding a return of about 4½ per cent. on the advances. Had the Bank remained solvent, and been advised to make such a claim as that now made, they would, I think, have been held to be barred from insisting on it; and I don't think the Liquidators, in this respect, stand in any more favourable position. And of this I am very clear, that it was, in such circumstances, a duty they owed to the Respondent to give him the earliest notice possible of their intention to make this demand, and in every event to do so before they set about realising the securities. Your Lordship has alluded to what the Respondent says in his pleading and in his evidence as to the course he would have followed had any such notice been given him; and had he received the offer, and made arrangements for taking over the securities at a valuation, with a view to their realisation by degrees on his own account, I have a very strong impression that, with his capacity, as disclosed in his correspondence and evidence in this case, his great experience in business, and with ample means at his command, he would have effected a very different result from that which has been the result of the present forced realisation. But he received no such notice; and I quite concur with your Lordship in thinking that the Liquidators are, on that account, as well as on account of delay which has occurred, barred from their present demand.

On the other question of title or interest to sue, I also concur, and on it I have nothing to add.

Lord Shand.—It must be satisfactory to the parties, as it certainly is to the members of the Court, that this case is now to be disposed of after a full investigation of the facts, and not on any merely preliminary formal or technical grounds. In stating the reasons which have led me to the conclusion that the judgment must be in favour of the Respondent, I shall, following the course which your Lordships have adopted, deal in the first instance with the merits of the controversy between the parties.

The question presented for determination is, Whether the respondent was guilty of a breach of trust in his capacity of a director of the Bank, in having misapplied its funds to the extent, as it is now stated, of nearly £300,000, by payments made in name of dividends to the shareholders out of the capital of the Bank, during the period from 1859 to 1870, both inclusive? The Solicitor-General, in presenting the case of the Liquidators in the last discussion, submitted a series of propositions which, he maintained, were established by the evidence; and as I think these propositions brought out fairly and clearly the points which it is incumbent on the Bank to make out, in order to succeed in this application, I begin with a statement of them. The first two were to the effect that during Mr Mackinnon's directorate, interest of the amount alleged by the Liquidators was debited to the American Railway Account, and that the interest so debited was divided amongst the shareholders. The former of these statements is conceded, the latter is disputed by the Respondent, who maintains—with reference to the allocation of profits yearly, by which sums, amounting in all to about £300,000, were, during the period in question, carried from the Profit and Loss Account to the Reserve and Buildings Fund,—that the Liquidators have failed to shew that the total interest on the American Account was paid away in dividends. But the more important questions between the parties are raised by the three following propositions said to be established, viz.:—

'*Thirdly*, That except to the extent of about £20,000, no 'part of that interest' (that is, the interest on the American account) 'was received by the Bank during Mr Mackinnon's 'directorate, either in cash, or as an equivalent for it'

'*Fourthly*, That except to the extent of that sum of about '£20,000, no part of the interest was ever recovered, but 'was an ultimate loss to the Bank; and

'*Fifthly*, That the Respondent knew that that interest was 'being debited and divided; that he knew it was not 'being received by the Bank; and that he knew there was 'no reasonable prospect of its ever being recovered'

There can be no doubt that if these propositions have been established by the evidence, that apart from the pleas of no title, and of bar to the present application to be afterwards considered, the Liquidators would be entitled to an order or decree against Mr Mackinnon for payment of so much of the sum sued for as the Court might be satisfied was paid away as dividend from the alleged or pretended interest on the American advances; for the case, as thus presented, is obviously one of wilful, deliberate, and intentional breach of trust by repayment to the shareholders of capital in name of dividend. The defence accordingly traverses the facts alleged. While it is conceded that by much the greater part of the interest was not received in cash, it is alleged by the Respondent that the whole was invested, and was regularly covered by securities held by the Bank, and given from time to time in respect of interest. It is farther and separately pleaded, that while Mr Mackinnon was not aware of the particular rates of interest debited year by year to the Railway Account, he honestly believed that the Bank was at all times possessed of securities sufficient to cover and provide not only for the principal sum due, but also for such interest as he understood was debited to the account from time to time. And in regard to the ultimate loss on the American Account, while it is not disputed that the amount was considerable, the Respondent maintains that this loss was the result of a forced sale of the Bank's securities in the liquidation; and that if a gradual realisation had taken place, by which a reasonable time had been allowed for the development of the railways, and the rise which actually occurred in the market value of the securities, the Bank would ultimately have received a

sum considerably in excess of the whole capital and interest standing at the debit of the acconnt.

The conflict hetween the parties as to the facts involves an enquiry into transactions, many of them of a detailed and complicated character, ranging over a period of twelve years, and heginning no less than twenty-four years ago. It is satisfactory, however, to be ahle to say, that there is no lack of the means of ascertaining the truth. It is not necessary to resort mainly, or indeed to any hut a comparatively limited extent, to the parole evidence of witnesses speaking now to their recollection of events and impressions of many years ago. There is a body of contemporaneous written evidence contained in correspondence and minutes, written at the time when the Bank's advances were in the course of heing made, which records in the clearest terms the views of the Bank officials and directors in this conntry, of their advisers in America, and those in the management of the railways in which the Bank was so deeply interested, both as to the valne from time to time of the Bank's securities, and the prospects of realisation. This correspondence, heing of the most confidential and nnreserved character, records faithfully the opinions and anticipations of the parties at the time. I have not known a case in which the evidence of this kind was more complete and satisfactory. The only difficulty in dealing with it has arisen from its great extent. It has heen necessary carefully to consider the effect of the varions and important changes which occurred in the extension and development of the railway enterprise in which the Bank hy its increasing advances hecame so deeply interested; the result of these changes as affecting the value of the Bank's secnrities from time to time, the reports and views of the Bank's representatives in America commnnicated to the Bank here; and the opinions which were formed hy Mr Mackinnon, and the other directors and officials of the Bank, as to the valne, present and prospective, of the securities held for the Bank's advances and accruing interest The conrse of the enquiry, the evidence of accountants, and the arguments for the parties, have made it necessary to form a jndgment as to the position of the Bank's account, with reference to the value of the securities as a cover for the Bank's advances and interest, and the views of the officials of the

Bank and the Respondent on that subject, on the occasion of each of the several extensions of the Racine and Mississippi Railroad. Only ninety miles in length of this line existed when Mr Mackinnon joined the direction in 1858; and in 1870, when he retired, it had been extended to 180 miles, mainly by the expenditure which the Bank was induced to make, adding to the line stage after stage during these twelve years, either because favourable anticipations had not been realised, or because unlooked for opposition from active competitors for traffic had been met with. It is not my intention to enter into the details in figures which the parties have respectively presented with reference to the dates when the several extensions to Freeport, Savanna, Port Byron, and Rock Island, were resolved on and carried out, or to state in detail the results of an examination, either of the Consolidation Act of 1866, by which the Racine and Mississippi Railroad became united with the Northern Illinois, under the name of The Western Union Railway Company, and the securities for the Bank's advances were all made to affect the entire line, or of the Mitchell agreement in 1869, for a sale of The Western Union Line, which was entered into and completed shortly before Mr Mackinnon left the direction. To enter with detail into these matters, or into the grounds of the conflicting views presented by the parties, as to the value of the different offers made from time to time for the Bank's property, would be an almost endless task. It has been necessary to look carefully into the evidence as to these various transactions, in order to form an opinion on the question, whether, as the Liquidators maintain, at the dates when they occurred, and with reference to the nature and particulars of the transactions themselves, the position and value of the Bank's securities were such as to make it improper to debit the account with interest, and as to the question whether this became known to the Respondent; but a general statement only can be given with reference to each of the important points of time in the history of the Railway Account, of the grounds which have led to the conclusion that the Liquidators have failed to establish the propositions laid down by the Solicitor-General, on the proof of which their success in this application depended.

It does not appear to me that there is auy dispute hetween the parties as to the law applicahle to this part of the case, as I think appears clearly enough from the propositious in fact which the counsel for the Liquidators seemed to coucede must be proved to entitle them to decree. It is clear that it is not necessary that there must he cash realized, and in the coffers of the Bank, received expressly on account of interest or profits, in order to justify the payment of a dividend. To enforce such a rule would he to ruu counter to ordinary and reasonahle usage in the case of mercantile companies In order to ascertain the profits earned and divisihle at any given time, the halance-sheet must contain a fair statement of the liahilities of the Company, including its paid-up capital, and, on the other hand, a fair or more properly *bona fide* valuation of assets; the halauce, if in favour of the Compauy, being profits. These profits may, and must often to a great extent, he represented hy ohligations of dehtors, often secured, and hy direct securities over property. They are not the less profits fairly realized aud divisible, because they exist in that form, and have not heen received in cash. If profits have been earned, and are, in the judgment of those in the management of the Company, secured, the shareholders of a joint-stock compauy are, in the ordinary case, entitled to have such profits which may properly be called realized profits, declared and divided, except in so far as they may be otherwise appropriated either hy the express terms of the contract, or hy the exercise of powers conferred on those charged with the management of the Company; and the directors may properly use funds otherwise available to them, and formiug part of the floating balances on capital account iu payment of the dividend. All this, however, infers a valuation of assets, and it is in this operation that it is represented the Respondent was guilty of a breach of duty, in having knowingly and wilfully overvalued the American secrities when he treated them from time to time as sufficient to cover interest and principal on the Bank's advances.

One thing is ahundantly clear with reference to such a charge, and to the duty of valuation of assets, that it involves a matter of judgment or opinion, and emineutly so with reference to such a suhject as the railroad properties on which the Bank's advances in the present case had heen laid

out. The amounts to be carried into the balance-sheet, and profit and loss accounts respectively for the year, depend on the estimate which has been formed of the value of the Company's property and securities. It seems to me that where such accounts have been regularly prepared in the ordinary course of administration of a business, and have been given effect to in the fixing and payment of dividends, and more especially where the acts are challenged after the lapse of a number of years, the Court ought strongly to presume the correctness of the proceeding, and to require clear evidence of want of *bona fides* where, as here, a case is rested on that ground; for although the charge has not been in these words, I cannot avoid the conclusion that it is made to that effect, when it is maintained, as the result of the proof, 'That the Respondent knew that the interest 'was being debited and divided; that he knew it was not 'being received by the Bank; and that he knew there was 'no reasonable prospect of its ever being recovered' And if it appears that the person against whom the charge is insisted in has taken pains to make himself acquainted with the various considerations which might affect the value of the subject of valuation, in order to form a correct judgment, all the stronger must be the presumptions in his favour, and against the view that would attach to him the want of good faith. Were the law otherwise, I fear it would only deter men of character and means and standing from taking part in the management of joint-stock companies.

I must confess that, in the present case, however, I have felt there are considerations which go very far to weaken, I should perhaps rather say, to overcome, the strength of the presumptions I have now mentioned. I refer to the fact, which does not admit of dispute, that although interest was regularly debited to the American Account, and the amount carried to Profit and Loss Account, no part of that interest over the whole period of twelve years ever reached the Bank in this country, while, in the meantime, the Bank's advances had grown from £117,000 to about £600,000 of capital, and the money so advanced had not been lent in the ordinary course of banking business, but had been advanced to be expended in extensions of an American railroad. It cannot for a moment be disputed that this is a most unusual, pro-

bably unprecedented, state of matters in the history of a banking company in this country. The fact being proved or admitted that interest was charged, and to a great extent paid away in dividends over so long a period, and in such circumstances, with the *prima facie* unfavourable impression which a proceeding so unusual was calculated to produce, seems to me to overcome much of the strength of the presumptions I have referred to, and to lay a certain *onus* on the Respondent—I mean the onus of accounting, by a satisfactory explanation and evidence, for the payment of so long a series of dividends in the circumstances. I have accordingly examined the evidence offered in explanation with scrutinizing care, and recognising the *onus* that thus lay on the Respondent, in circumstances so peculiar. The result, however, has been to satisfy me (1) that the increasing advances were made from time to time under a complete conviction that they were necessary in order to obtain an ultimate recovery of the large sum at stake when Mr Mackinnon became a director; (2) that while interest was being debited to the Railway Account, Mr Mackinnon honestly believed that the Bank's securities were sufficient to cover the whole amount of principal and interest due to the Bank; and (3) that he had reasonable grounds for firmly holding that opinion.

Before noticing the general grounds on which I rest this conclusion, I must, in the first instance, refer to a point which has always appeared to me to be of primary importance as affecting the decision of the case—I mean the effect of the high rate of exchange between America and this country which prevailed throughout a great part of the twelve years in question, and particularly during the years from 1862 to 1870, both inclusive. From the Table contained in the Joint Statement for the Parties, it appears that the American currency was so depreciated, that, in place of five dollars being equivalent to the £, the rates during the years just specially mentioned varied from five to seven, and eight dollars; and even at one time, in December 1864, the rate of exchange was 10½ dollars to the £. Now the Liquidators, by the evidence of their accountants, and the pleadings of counsel, have maintained that in valuing the Bank's securities, the various classes of bonds held from the railway companies, and also in estimating the value of the various offers

made from time to time for the purchase of the railways and securities, the directors were bound to take the current rate of exchange with this country at the time; and having first made their estimate in dollars, to convert the amount into money sterling, not at the normal rate of five dollars to the £, but at the much lower rate prevailing at the time. If the Liquidators be wrong in this contention, I have never seen, and do not now see, how they could possibly succeed in this application, and I rather think this was virtually conceded before the close of the argument. It cannot be disputed, that if, in place of the conversion of the estimated value of the Bank's securities in dollars, at the rate of 8½, or 6 or 6½ dollars to the £, being the rates taken by the accountants for the Liquidators in three valuations made by them in 1864, 1866, and 1869 respectively, the normal rate of five dollars to the £ be applied, a very much larger amount is the result,—and so important is the difference, that in several instances of points of time at which valuations have been made by both parties, either with reference to the securities then held by the Bank, or to offers of purchase made to the Bank, in the one view there is a large deficit on the amount necessary to meet the balance at the debit of the Railway Account; while in the other view there is either a clear surplus after paying off principal and interest, or the deficiency is so small,—a matter of £20,000 or thereby, on a total sum of £900,000 of principal and interest,—as to make the figures substantially square each other. It seems to be clear, therefore, that in any view that can be taken of the case, the Liquidators could only succeed in this application by shewing that the officials of the Bank were bound to adopt the principle of valuing their securities in money sterling, according to the rate of exchange of the day. This, I am clearly of opinion, the officials and directors were not bound to do.

In the opening argument on the evidence, it was maintained that not only had the Bank invariably looked at each offer made for their securities in the single light of what it would produce in sterling money, if at once remitted home, at the rate of exchange of the day, but that it was very much of an after thought on the part of the Respondent to maintain the view that he regarded the state of matters in America as

temporary, that he looked for a speedy termination of the war; that, with returning peace, a strong Government would give security to traders, and lead to the commercial prosperity of the country; and that with all this, in a short time, a return to the normal rate of exchange might be looked for The Respondent's counsel was able, in reply, to shew by a number of passages in the correspondence between the Bank and their agents and representatives in America, and in letters to and from Mr Mackinnon, that, as he himself explains in his evidence, he entertained the opinion that the exchange would ere long right itself and come to par, and that there was every reason for believing that the Bank would act on that view; and even if they sold their securities, invest the proceeds in 5/20 government bonds, or other securities recommended to them, and have these realized, and the proceeds remitted, when the loss on exchange could be avoided. In the concluding argument for the Bank, it was no longer, I think, maintained that there was not evidence to shew that, in the event of a realization of the Bank's securities in American currency, it was not in the view of the parties to retain the money invested in America, till the loss on the exchange could be avoided. The argument finally, and at least mainly pressed, was that a purchase of other securities would have been a speculation into which the Bank was not entitled to enter, any more than if they had realised securities at home, and sent out the proceeds to get the benefit of a favourable exchange for remittance, and in the expectation of gaining by exchange afterwards coming to par.

It seems to me, that the contention of the Bank on this question—a contention which is vital to their case—is unsound. To begin with, the effect of the rate of exchange, entering as it does into the principle of valuation, involves a matter of opinion or judgment, and it would be necessary to shew want of *bona fides* on the part of those who, in making their valuations at the time, or in resolving on the best course to be followed in the event of a sale, acted, or were prepared to act, on the view that they were not called on to give effect to an abnormal rate of exchange which they regarded as temporary. There is no evidence to support acbarge of this kind. Again, there is abundant evidence corroborative of what Mr

Mackinnon said as a witness, that the subject was presented for consideration, and that if the Bank had realised money they would have acted in accordance with his views, which were formed after considerable experience in his mercantile dealings in his own private business. In March 1862, Mr Irvin, the Bank's confidential adviser in New York, wrote to the secretary in Glasgow.—'The prospects of the country in 'connection with our domestic war is much changed. The 'superior power and resources, as well as determination of 'the North, is so manifest that the war must soon be closed, 'or at least be confined during the remainder of its 'continuance to a small portion of the cotton States, where 'the revolt may be expected to die out speedily.' In November of the following year, Messrs Irvin & Company, in another letter to the Bank, put their view very plainly. They say, with reference to the prospect of offers for the Bank's securities, 'The question of exchange has, to us, 'presented itself in this aspect—that your property being 'already on this side, subject to our depreciated currency, if 'we could, while getting rid of present responsibilities, obtain 'for your other securities of same amount, of stronger and 'more available character, the Bank would be in a better 'position for realising their property when exchange became 'more favourable, and in the meantime be getting interest on 'the whole.' Mr Thomson, the manager of the railways, about the same time, wrote to a similar effect. He says in writing to the Bank a few days before the letter last referred to—'The question of exchange would present the 'separate consideration to the Bank, whether the unfortunate 'crisis in which this country is involved, made it advisable to 'withdraw their money at once at a loss; or whether it was 'best to allow it to remain in American securities, with 'confidence that the course of events will restore the amount 'so held at a par exchange in a few years? My confidence 'in the future is strong; and I cannot contemplate the vast 'resources of the country, the energy and intelligence of the 'people, without feeling assured that a strong government 'will be established, which will succeed the present govern-'ment of the Northern States, and take upon itself the 'responsibilities arising from the acts, or created by the 'present administration. . . . If other securities could be 'obtained in exchange for those now held of equal value

'without responsibilities, or holding so much at risk in one 'enterprise, would it not be best to make the transaction, 'and await the restoration of a legitimate mercantile 'exchange?' It is only necessary to quote further the Bank's reply through their secretary on the 5th of December 1863, following on a meeting of the Bank directors held two days before, at which Mr Mackinnon was present, when the letters of Irvin & Company and Mr Thomson just noticed were read. The secretary's letter to Irvin & Company is in these terms:—'I wrote you on the 27th ulto., 'and have since been favoured with yours of the 17th 'ditto, enclosing Mr Thomson's letter of the 10th, and to 'both the directors have given their most careful considera- 'tion. The suggestion of making an exchange of our 'interests in the railways for some other securities of a 'stronger and more available character, free from further 'outlay, meets with our approval, and would dispose us to 'hold on, and be content with a moderate interest until the 'exchange got rectified. The subject will be again taken 'up after we have a reply from you to our letter of the 20th 'ulto.' The advice of Irvin & Company is what was no doubt given and acted on at that time in the case of many private investors in this country having securities in America. There are other important letters to a similar effect of subsequent dates, and in particular a letter from the Bank inviting suggestions on the subject, and a reply by Irvin & Company suggesting amongst suitable securities for investment, U. S. 5/20 bonds, which could be had about par, and one or more letters by Mr Mackinnon, in which he expresses the opinion that exchange will soon be at par. It remains only to be stated that, as appears from the evidence of Mr Guild, the Bank, on account of the unfavourable exchange, actually returned to America a sum of £2300, which had been sent home to them in cash, in order that it might be invested in America, and remitted only after the exchange had reached, or nearly reached, par, and further directed Irvin & Company to retain the interest paid on the Northern Illinois bonds for the same reason.

Again, it seems to me to be quite unsound to represent the proceeding of leaving money in America to be so invested as a speculation of the same kind as the sending out of money for investment. As Mr Irvin observed, property

on that side was already subject to the depreciated currency, and it was only an act of fair and reasonable administration, on the part of those who thought the depreciation temporary, to avoid the loss which would result from their withdrawing it by remittance to this country. And even if there be an element of speculation in taking that course, which is probably quite true, this cannot affect the question here under consideration, which after all relates to the *bona fides* of the valuation or estimate of the Bank's assets. I have perhaps dwelt longer on this subject of the rates of exchange than was necessary, but, as I have said, it seems to me to be so important as to be at the root of the case of the Liquidators, and it is because of this that I have given my reasons fully for holding that the views maintained on their behalf cannot receive effect.

I have said that I think it is proved that the Respondent honestly believed throughout the currency of the Railway Account that the Bank's securities were sufficient to cover principal and interest, and that he had reasonable grounds for this belief, and I shall now state what has led me to that conclusion. Mr Mackinnon has himself given clear testimony to that effect. He is evidently an intelligent and able man of business, and his evidence was generally given with candour, and so as certainly to impress me favourably. I have no doubt of its absolute truthfulness. The case he presented for himself was not that of a director ignorant of the business which has been the subject of enquiry, who trusted entirely to the paid officials of the Bank, and who did not accept responsibility himself for what was done. On the contrary, he explains that in the autumn of 1858, the year in which he joined the direction, he made himself acquainted with the state of the account, and went over the recent correspondence in regard to it, and it is clear that from that time onwards he took an interest, it may be fairly said an active interest, in regard to the account, and the securities which the Bank held and acquired to cover their advances; and that when called on he gave such assistance as he could in advising as to the best policy to be pursued in order to secure and ultimately realize the Bank's debt and the accruing interest. This statement must be so far qualified as to say, that having business interests of magnitude of his own

requiring his constant attention, Mr Mackinnon was frequently absent from Glasgow, and from this country, for considerable intervals, and that although, when in Glasgow, he was available when wanted for consultation on the Bank's business, particularly in relation to this account, and even when not at a great distance, he was ready to give his advice by letter when consulted in this way, yet he did not profess to do more than aid the manager for the time, and the Board, with such assistance as he could give consistently with giving due attention to his own business matters When he entered the direction, he found the Bank involved in the undertaking of the Racine and Mississippi Railway Company to the extent of about £117,000. He became aware of all the important advances made thereafter, by which the debt was so largely increased, and, indeed, was a party to the granting or sanctioning of a number of them. In regard to the interest debited annually to the account, he explains that it was left to the manager and other officials of the Bank, as a matter of detail, to debit the various accounts with the proper rates of interest, and that down to 1857 at least, he had no information or communication with the manager on this subject, in regard to the American Railway Account. He assumed, however, that this account was debited with interest from time to time at the usual rates applicable to ordinary overdrawn accounts, and was of opinion that it was right to do so, as he considered principal and interest to be fully covered by the property and the Bank's securities. It appears from the evidence of Mr Findlater, who was head cheque clerk in the Bank, that, in point of fact, in 1857 and 1858, the ordinary rate upon cash credit accounts was charged, and that thereafter, by direction of Mr Stronach, the manager, the higher rates of seven and eight per cent., mentioned in the bonds held by the Bank, were debited to the account—the difference being an increase of two to three per cent. on the ordinary cash credit account rates.

It has not been suggested that there is any reason—beyond the grounds which are presented by the accountants for the Liquidators as to the value of the securities at different times—for refusing to give effect to the evidence of Mr Mackinnon He had certainly no personal interests to be served by either increasing the Bank's advances in America, or

treating the account as one fully covered by securities, if he had thought it was not secured. His interest in the Bank was comparatively small. He was a holder of £2000 of stock, which he retained for some years after he left the direction—selling out ultimately only because he was disposing of all his investments of that kind to lay out his money to better advantage. He gave the Bank but a limited amount of his firm's business in discounts; and, so far as appears, he never for himself nor friends applied for or obtained any special advantage from the Bank. It is, in my opinion, a circumstance very favourable to him in the present question, that in his letters written from Homburg in June 1867, the ninth year of his directorate, he proposed a policy of caution—suggesting that in that year interest on the Western Union Bonds should not be carried into the Profit and Loss Account; and also that a proposal to increase the Bank's dividend from 7 to 8 per cent. should not be agreed to, in both of which points he seems to have stood alone and been over-ruled. He explains in his evidence the reasons which induced him to make these suggestions—the severe commercial crisis of 1866, and the fact that an offer for the Bank's American securities, then under consideration, seemed likely to fall through; and it seems to be only a fair inference from his conduct in 1867, that if at an earlier date he had thought the suggestion not to debit the American Account with interest, or to carry the amount to the Profit and Loss Account, should have been made, he would have made the suggestion then.

Mr Mackinnon's evidence is strongly corroborated in all its material points by the great mass of written evidence to which I have already referred. He was not himself in America to make his own observations or inquiries on the spot. His impressions and belief were therefore formed entirely on the information furnished to the Bank and the directors from time to time—a circumstance which leads me to say that, after all, the inquiry on this part of the case is, not so much what was the intrinsic value of the property on which the Bank had advanced so much money, as what were the Respondent's views of the value of that property, formed on the reports and communications laid before him. Your Lordships have referred to the communications which

were regularly and frequently received from Mr Irvin and Mr Thomson, and I concur in all that has been said as to the effect of their letters, reports, and memoranda. It is impossible to read the correspondence of Mr Irvin without being satisfied that the witnesses who speak to his standing—his great knowledge and experience and sagacity in business—have not spoken too highly. It appears that on two occasions, at the special request of the Bank, he went specially over the property of the railway companies, in order to form an independent judgment—on one of these occasions having spent between two and three weeks in doing so—and that once in the course of Mr Mackinnon's directorate he was in this country, and had an interview with the board. There can be no doubt that Mr Thomson also was an able and energetic man of business. It is said that he was sanguine, and that may be, and probably is true, but I am bound to say that the proof as a whole has left the impression on my mind that Mr Thomson's views of the future prosperity of the country which the railway lines traversed, and the ultimate success of the lines themselves, have been borne out by the results, and that it would probably have been better for the Bank in the end if they had yielded to his advice about certain of the offers of purchase of the whole undertaking which they rejected, with the final result of concluding the agreement with Mr Mitchell. But the question of importance here is, What did Mr Irvin and Mr Thomson think of the undertaking on which the Bank's advances were made, and how did their views impress the Bank officials and the Respondent? To this inquiry only one answer can be made. They invariably represented that, though patience must be exercised, the property was a most valuable and improving one, and the Bank's advances were duly covered, and would be repaid with interest. Mr Thomson, who was repeatedly in this country, fully discussed the subject with the board, and strongly impressed them with his views. Mr Hall, who was sent out to report on the subject, was not so favourably impressed, at least with the prospects of a speedy realization, but Mr Mackinnon explains that throughout he took a more favourable view of the Bank's investment than Mr Hall did, and Mr Dunlop, his colleague, and subsequently Mr Leresche, who was at a later time sent to America on the Bank's busi-

ness, were both strongly impressed with the conviction that the Bank would be able to make a realisation which would entirely recoup them in principal and interest. There was no doubt anxiety, particularly at times of temporary depression. This was inevitable about so large an advance on a recently constructed railway in a foreign country, and Mr Hall was particularly impressed with that feeling, having in view that the creditor was a Bank in this country. But allowing for all this, it is, I think, clear from the contemporaneous correspondence and documents that there never was a time when the parties either in America or in this country were led seriously to doubt that the Bank was fully secured. That circumstance is decisive of the present question. That Mr Mackinnion had reasonable ground for his opinion and belief, is proved by the fact that he had the assurances of so many others on whose opinions he relied, who knew the district and the railways thoroughly, that the property was most valuable and improving. He had reports shewing the actual cost of construction and value of the lines, and of the stock and plant with which they were fully equipped; and these shewed the property to be fully capable of bearing the burdens on it, and were strongly confirmatory of the opinions and advice on which he relied, and from time to time, and particularly after the line had been carried to Savanna, there were a number of offers made to purchase it, the terms of several of them being such as would recoup the Bank in principal and interest, unless indeed they had been compelled at once to turn their new securities into money, and remit to this country with a most unfavourable exchange, for which, as I have already said, I think there was no necessity.

There has been a considerable controversy on the question whether there was ever any transaction by which the Bank received a large amount of securities in name of interest. I think it has been made out that from the time the Northern Illinois Railway was in operation considerable sums were received in cash on account of interest; and although the interest generally falling due on the bonds of the Racine and Mississippi Railway Company, and the certificates for the the monies advanced to the Farmers' Loan and Trust Company, was not paid when due, but was expended with the

Bank's consent in the construction of the extended lines and equipment of the railways, yet the railways were by this expenditure increased in value, and when the amalgamation of the whole lines into one, under the name of 'The Western 'Union Railway Company,' was carried out, I think it is clear that securities by the new Company in bonds and stock were given to the Bank on account of the past-due interest owing to them. I agree, however, in an observation made by the counsel for the Respondent, that it is really not very material to the decision of this case, whether bonds or other securities were given at any particular time, to represent or cover interest expressly *eo nomine*. It was justly observed by the counsel for the Liquidators, that shortly after Mr Mackinnon joined the board, this Railway Account became no longer an account, in which Gemmell, Watson, and others were the debtors, and the parties interested in the railway bonds held by the Bank merely as a security. The best arrangement the Bank could make, was to discharge the debtors and take over the bonds as their own property. This it was that led the Bank into the gradual expenditure of money, in extensions of the line; and the result undoubtedly was that the accounts, in place of representing loans to a customer, really represented a speculative enterprise That being so, the question, What was the Bank's position at any particular moment, was really one of valuation of the Bank's securities—bonds and stocks—after stock had been acquired —and the amount of any valuation was rather a question of original outlay and profits, than of capital and interest, as in the case of a loan to a customer Accordingly, when interest was being year after year debited to the account, the true question which those in the management of the Bank had to solve was whether, on a fair valuation, there was such a profit on what had become really a speculation by the Bank, as would warrant the carrying of 7 or 8 per cent. to the debit of the account, and so to the Profit and Loss Account. If it be supposed that the Bank, under the sale to Mitchell, had got a much larger price, it is obvious this would not have represented interest in any way, but simply so much profit. It thus appears to me that the true question in the case is not did the Bank receive regularly the interest on its bonds, although I think that substantially they did so, but rather at the time of balancing of each year

was there on a sound valuation a profit to carry to Profit and Loss Account.

In this point of view it is not unimportant to note that there were several circumstances in the history of the transactions by which the Bank profited largely, the more important of which I may here notice The first of these was that about the time of the amalgamation in 1866, when the Western Union Railway Company was created, the whole of the original stock of the Racine and Mississippi Railway Company was extinguished by means of the foreclosure suit at the instance of the Bank as bondholders The Bank thereby became proprietors of the line in virtue of their mortgages, freed from stock, and in the amalgamation it became possible, accordingly, to create all the more new stock Again, at a time when the East and West Division bonds of the Racine and Mississippi line were depressed, Mr Thomson having faith in the capabilities of the line, advised the purchase of bonds at 25 % and 40 % respectively, and the Bank for the purpose at once of having a decided control over the management, and also with the view of reducing the average of the bonds they had, authorised a considerable purchase to be made. For the bonds so purchased they got in exchange bonds of 1000 dollars each at par, over the Western Union Railroad at the amalgamation. Again, at the formation of the northern Illinois Railway Company on the suggestion of Mr Irvin and Mr Thomson, the Bank purchased about 2500 shares of 100 dollars each of the stock of the Company, on which only 25 per cent was paid At the amalgamation this stock was treated as fully paid up, and new stock of the amalgamated company given for it accordingly, obviously to the great advantage of the Bank. Again, there was a large profit on the Combination Account referred to in the evidence. Mr Guild says of it, that the cost to the Bank was £54,896, while the bonds alone realised £80,007 ; half the stock sold to Mitchell, £21,177 ; and there was besides a share of the other half of the stock, which was sold by the Liquidators. And besides these, there were profits arising to the Bank on the two Iron Rail Credits, also explained in the evidence, which are estimated by Mr Guild at £20,245 and £13,000 respectively. In the question of treating the Railway Account as bearing interest or profit,

it was obviously quite legitimate to take the results of these various transactions into view.

I have only to add, on this part of the case, that I cannot doubt that, by the act of amalgamating the lines and consolidating the undertaking into one, the property of the Bank was greatly enhanced in value, and, accordingly, the result was immediately seen in the offers which from that time onward were made by different parties for the Western Union Railway. Finally, that railway was sold to Mr Mitchell, before Mr Mackinnon left the board, for a certain payment in cash, and bonds and stock, which I think were fairly regarded as sufficient securities for the Bank's debt, principal and interest. It is clear that all the parties at the time placed great value on the stock, and had reasonable grounds for doing so. The investment was thus put in a shape in which the Bank were freed from any farther call for advances, and they obtained securities on which interest was regularly paid from 1870 till the Bank stopped payment. On the merits of the case, therefore, and as the result of a review of the material points in the evidence, I am satisfied that judgment ought to be for the Respondent; and, having given the details of the evidence my best consideration, I must add that, so far as I am concerned, I do not think the question one of doubt or difficulty.

The Respondent maintains three pleas of a preliminary nature with which I shall now deal shortly, The first of these is that all parties were not called, that the application cannot be insisted in against Mr Mackinnon alone, and without having the other directors of his time made respondents, as being liable in joint responsibility, secondly, that the Liquidators have no title to maintain such an application, and third, that the application is barred by the lapse of time and proceedings of the Company, from 1870 to 1878, when the liquidation commenced; and alternatively by this, and the realisation by the Liquidators of the Bank's securities without notice to the Respondent of this claim, or giving the Respondent an opportunity of himself taking over the securities.

On the first of these points my opinion is against the Respondent. It is enough to say that the case presented is one of breach of trust, and it is quite settled that the responsi-

bility in such cases is joint and several, so that the complainer in such a case is entitled to maintain an action against any of the alleged wrongdoers

On the question of title, I concur with your Lordships in holding that the Liquidators have no title to enforce such a demand as is here made, at the point to which the liquidation has advanced. It must be taken that, for all practical purposes, the liquidation is now in its second stage—viz, the adjustment of the rights of the contributories; for the claims of creditors have been fully provided for by the remaining assets in the hands of the Liquidators. Can the application, then, be maintained, in name of the Company or its Liquidators, on behalf of the whole body of solvent shareholders? I am of opinion it cannot. It appears to me that a claim for repayment of dividends wrongly paid out of capital, when the claims of creditors have been provided for, can only be insisted in by individual shareholders, each for himself; and that, assuming that such a claim will lie, its success will depend on considerations personal to the individual, and depending on his peculiar position. When the Bank stopped payment, out of 1282 holdings of the Bank's stock, 588, representing stock to the amount of £375,551, had been in whole or in part acquired prior to 1870. These holdings, being about four-ninths of the whole, were held at the stoppage by the persons who had drawn the dividends said to have been improperly paid out of capital, or part of them. Shareholders owning sixty-nine only of these holdings remain solvent, the owners of the remaining 519 holdings having surrendered and assigned their interest to the Liquidators—that is, to the remaining solvent shareholders. The shareholders who thus take as assignees in the liquidation can of course take no higher right than their cedents had when the liquidation began, so that, if the shareholders themselves could not claim a second payment of dividends, neither can their assignees do so in their right. Now, I take it to be quite clear that shareholders, who have already drawn dividends, however improperly the payments may have been made, cannot ask payment of the same sums again. They may have a claim of damages for mismanagement of the Company, in which the fact that a

great part of the capital had been paid back might have an important bearing; but there is no legal medium on which it can be maintained that the shareholder shall have his money paid to him twice over. This seems obvious on the mere statement of it, and it was expressly laid down by the Lord Chancellor (Hatherley) in the case of Turquand, L. R. 4 Chanc., A., p. 383. This being so, it follows that the Liquidators cannot maintain their claim. If they succeeded, they must make a *pro rata* division of any sum received by them amongst the solvent shareholders, just in the same way as they would divide surplus assets after payment of the Company's debts. In this way shareholders to the extent of 4-9ths—that is not much short of a half of the holdings in 1870—would get payment a second time of the money they have already got as dividends. Even as to the remaining shareholders, it is a question of great difficulty to answer whether, seeing the holders prior to 1870 of the shares they now possess got the dividends applicable to these shares, it can now be maintained that new holders of the shares can demand a second payment. If there be room for such a claim, I think it must rest on some representation made in reports by the directors or in some other way, in regard to the capital extant, on the faith of which the shares were purchased; and if that be so, it is plain that the validity of such a claim must depend on special circumstances peculiar to the individual. The result in any view is that the claim is not a Company claim. It cannot be maintained on behalf of all the shareholders as a body, for the shareholders are in many different positions; and even if the claim were made by the shareholders themselves, it is certain that a large class of them could not possibly succeed. The case is of the same class as that of Mann *v.* Sinclair, 6 Ret. 1078, in which it was held that the trustee on a sequestrated estate had no title to sue an action for the general body of creditors in reference to a state of matters in which the creditors were in different positions—some, it might be, with a claim against the defender, while others certainly had no such claim.

Finally, I am of opinion that judgment ought also to be for the Respondent on the pleas in bar of the application. He had no notice of any claim against him, in connection with the Railway Account, till the service of the Summons in

the ordinary action in June 1880. After he left the direction, fully eight years elapsed before the liquidation began. During these years the business of the Company was carried on regularly by a manager and other officials, and a board of directors. The Company continued in possession of the securities on the American Account as the respondent left them, drawing the interest regularly on the Western Union bonds. Now, if this be, as the Liquidators represent it, a Company claim, for how long a time may the Company, carrying on its business, delay the assertion of it? It appears to me that it must be brought forward within a reasonable time; and I am disposed to hold that, after so long a period as eight years, it cannot be entertained. The opposite view would infer that the directors might allow any number of years within the prescriptive period to elapse—and it was so maintained in the argument—take the benefit of the securities in the meantime, and wait the result of rising and falling markets, and finally, after a loss for the first time, assert their claim many years after a director had retired. I cannot assent to this, or hold that because the company carries on the business by a manager and directors, that this gives the partners privileges in a question of this kind which a private company would not have. It appears to me that within a year, in ordinary circumstances, or at all events in the course of a second year, the demand must be made, so that the Respondent may preserve any rights of relief, or rights to demand repayment of the dividends from any persons liable, and may also have the option of taking over the securities if he think fit, admitting his liability. It is not necessary, however, to decide this question taken by itself—for besides the lapse of time already mentioned before the liquidation, nearly two years elapsed after the liquidation began before the ordinary action was raised, and, in the meantime, the Liquidators had parted with all the Bank's securities in exchange for others, which others they had realised at a considerable loss on the whole account. I may say here that I do not think that this realisation can be taken as giving the means of ascertaining the true value of the Bank's securities acquired under the Mitchell agreement. But apart from this, taking the realisation into view with the delay that occurred in making the present claim, it seems to

me that the Company is barred from maintaining this application I do not doubt that the Liquidators acted rightly in realising as and when they did, seeing that it was necessary for them to convert the assets of the Bank into cash without delay to enable them to pay the demands of creditors. But I am equally satisfied that with time, it might be a year or more, for negotiation, and, if necessary, legal proceedings in America, a result considerably more favourable would in all probability have been obtained; and I refer especially to the stock of the Western Union Railway Company, for which, although large offers for it had been previously rejected by the Bank, a trifling sum only was realised, as has been explained by my brother Lord Mure. The Respondent was, I think, entitled to an opportunity of taking over the whole securities, which he might have done on much more favourable terms than the Bank realised, and even on such terms as might possibly have induced him, in order to avoid litigation, to have made some settlement of the Liquidators' claims I do not think it is any sufficient answer to Mr Mackinnon's plea on that point, to say that the Liquidators had not, when they realised the securities, resolved to insist in a claim against him. The hardship to him of sustaining the claim, after all the securities have been realised at a considerable loss, which might have been possibly avoided, would be all the same. I am of opinion that the delay and proceedings of the Company up to 1878, combined with the proceedings of the Liquidators before they made a claim against Mr Mackinnon, form a complete bar to the present application.

The Lord President—Then the form of the order will be to refuse the prayer of the Note.

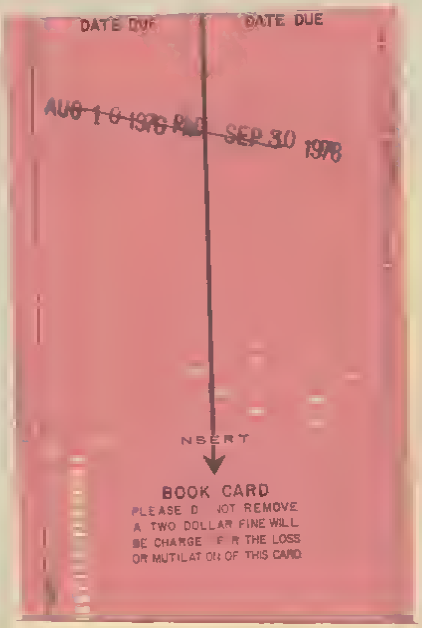
Mr Mackintosh.—With expenses?

The Lord President.—With expenses.

Edinburgh, 23d December 1881.—The Lords having considered the Note for George Auldjo Jamieson and others, the Liquidators of the City of Glasgow Bank, for decree against William Mackinnon, No. 263 of process, with Answers thereto for William Mackinnon, and relative Proof and Proceedings, and heard counsel for the parties, Refuse the prayer of the said Note, and decern. Find the respondent William Mackinnon entitled to expenses; allow an account thereof to be lodged; and remit the same to the Auditor to tax and to report

Interlocutor dated 23*d, and signed* 24*th December* 1881.

John Inglis, *I.P.D.*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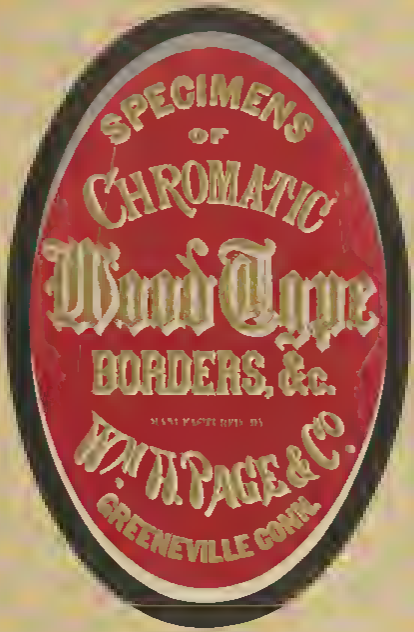
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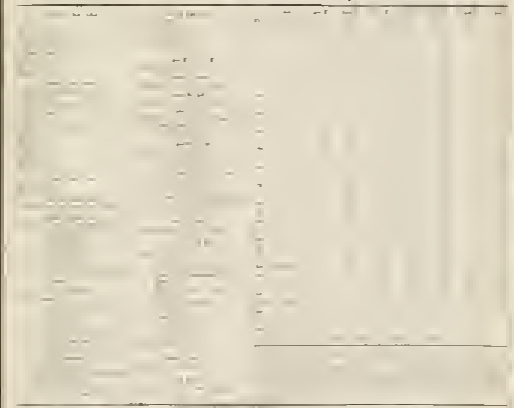

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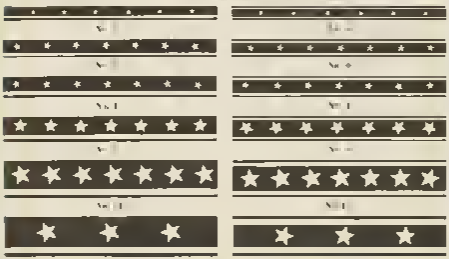

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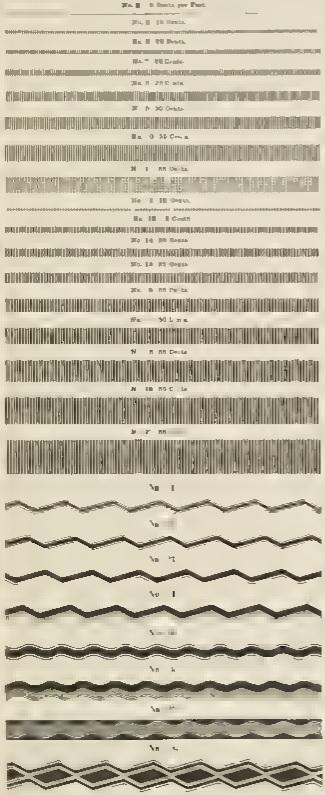

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[illegible] Line Extended Class I 18 Cents.

KITCHEN

[illegible] Line [illegible] Ornamented No. 1 Class F 1 Cents.

ROUND

[illegible] Line Aetna Ornamented No. 1 Class F 90 Cents

BITS

Twenty four Line Aetna Ornamented No. 2. Class F 78 Cents.

SIN

[illegible] for WARREN INKS, from [illegible]

PRINTED BY

W. H. PAGE & CO.,

WITH

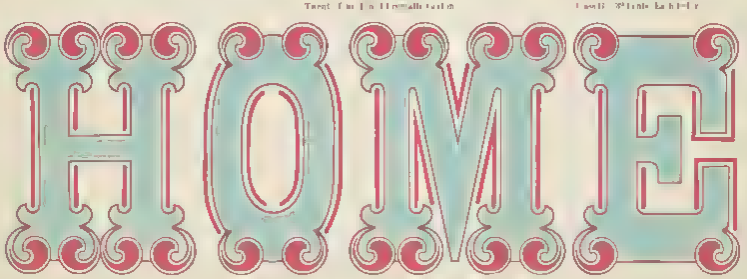
WADE'S INK.

FROM

H. D. WADE & CO.,

No. 50 Ann St. N. Y.

Manufactured by Wm. H. Page & Co.



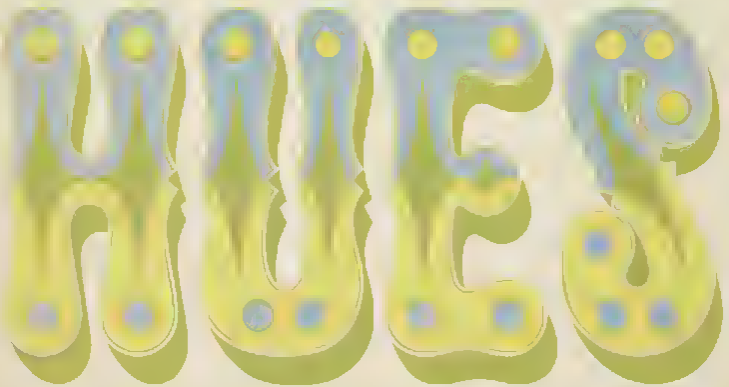
Manufactured by Wm. H. Page & Co.

Manufactured by Wm. H. Page & Co.

Ten Line Pyramidic Alphabet No. 1 — Class E. 14 Cents, Each Color

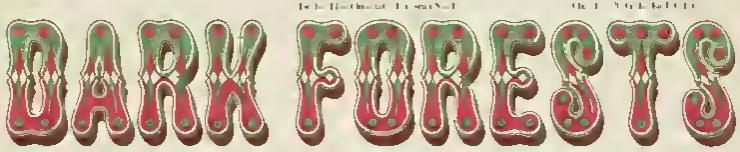
Twenty Line Pyramidic Alphabet No. 1 — Class E. 22 Cents, Each Color

Thirty-Six Line Pyramidic Alphabet No. 1 — Class E. 38 Cents, Each Color

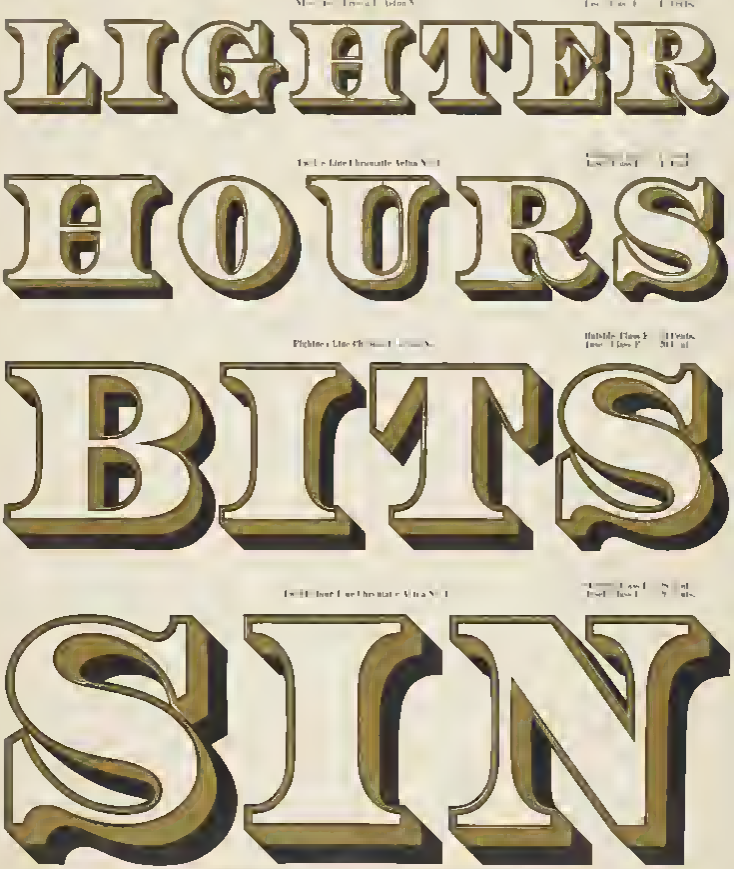


Printed with WAHLEN INKS from H. H. Wahlen Co., 238 William St., New York

Manufactured by Wm. H. Page & Co.



Manufactured by Wm. H. Page & Co.



Manufactured by Wm. H. Page & Co.

Nine Line Chromatic Alphabet No. 1

Outside, Class F
Inset, Class F

Twelve Line Chromatic Alphabet No. 2.

Outside, Class F
Inset, Class F

Eighteen Line Chromatic Alphabet No.

Outside, Class F
Inset, Class F

Twenty four Line Chromatic Alphabet No. 2.

Outside, Class F
Inset, Class F

Printed with WARD'S INKS, from H. D. Ward & Co. 41 East 42nd St. New York

Manufactured by Wm. H. Page & Co.

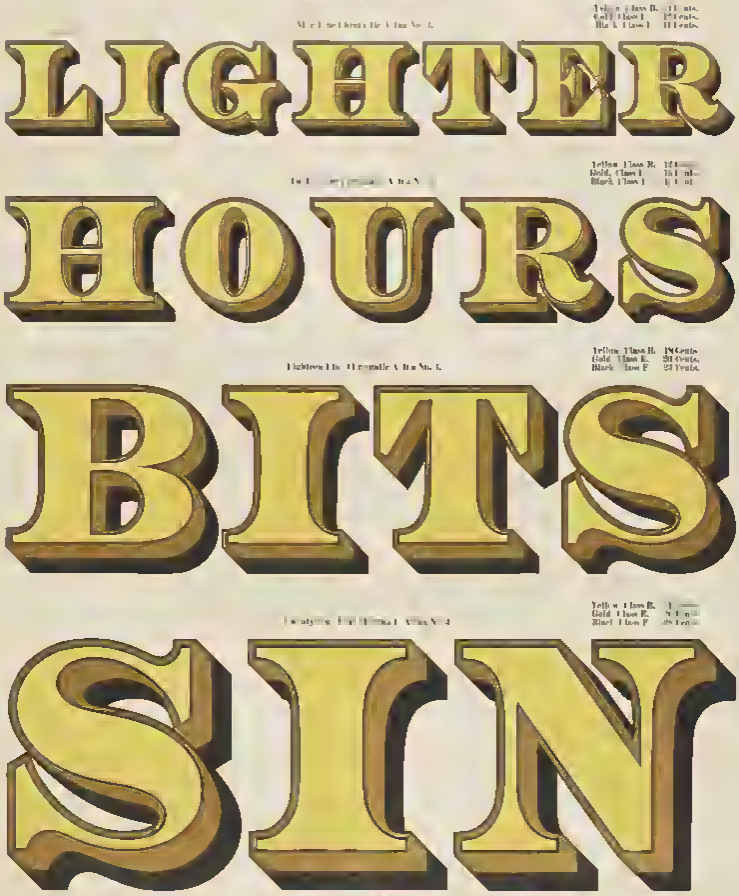
LIGHTER

HOURS

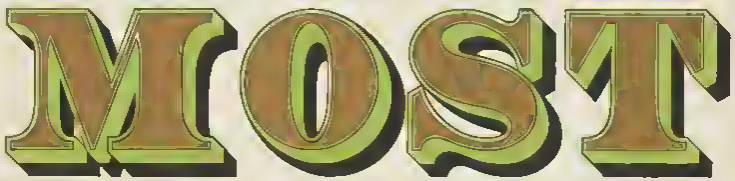
BITS

SIN

Manufactured by Wm. H. Page & Co.



Manufactured by Wm. H. Page & Co.



MANUFACTURED BY

Wm. H. Page & Co.

GREENEVILLE, CONN.

Dots No. 1 squared up to any size 11 Dots to square inch

2 " " " " 6 "

3 " " " " 4 "

These Dots can be cut from 40 to 100 lines to the inch.

Price per Proof $3.00 per Set for the three Dots complete


TINT No 1
MANUFACTURED BY
Wm. H. Page & Co.
GREENFIELD, MASS.
TINT No 2
TINT No 3

TINT No. 7

MANUFACTURED BY

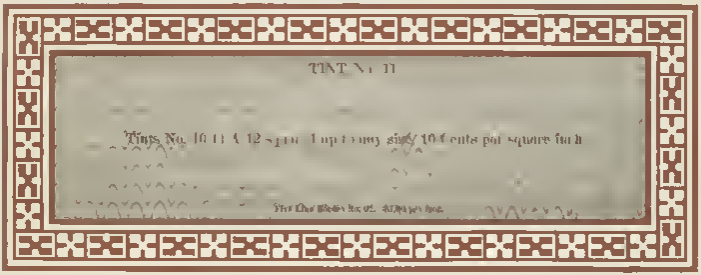
Wm. H. Page & Co.

GREENWICH, CONN.

TINT No. 8

TINT No. 9


Wm. H. Page & Co.
GREENEVILLE, CONN


TINT No. 11


TINT No. 12

HINT No. 1

MANUFACTURED BY

Wm. H. Page & Co.

GREENVILLE, CONN.

Two Line Border No. 61 — $1.50 per foot complete.

HINT No. 14

Tints No. 13 14 & 15 supplied in any size — 10 Cents per square inch

Two Line Border No. 6 — $1.00 per foot.

HINT No. 1

[illegible]

MANUFACTURED BY

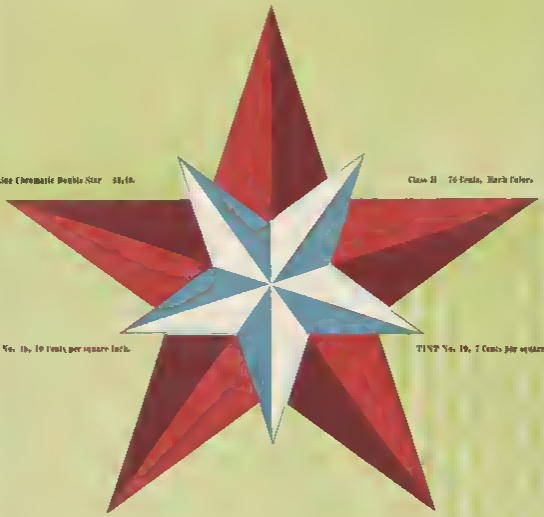
Wm. H. Page & Co.

TINT No 16, 10 Cents per square inch.

TINT No 17 10 Cents per square inch.

50 Line Chromatic Double Star $5.00.

Class H 70 Cents. Match Colors.



TINT No. 15, 10 Cents per square inch.

TINT No. 19, 7 Cents per square inch.

TINT No 20, 10 Cents per square inch

LIMA BEAN No 11 [illegible]

MANUFACTURED BY

Wm. H. Page & Co.

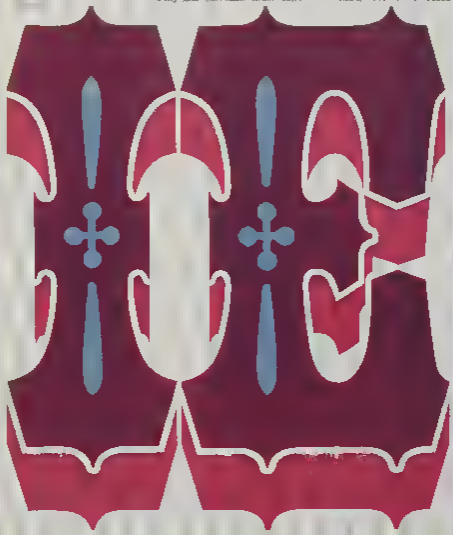
Printed with WOOD TYPES from W. H. Page & Co.'s Foundry, 37 Ann St., New York

MANUFACTURED BY

Wm. H. Page & Co.

Fifty Line Chromatic Renaissance.

Quoted in 12pcs 5ft 55 Cents.
Insert. 1Pce 1ft 1st Cents.



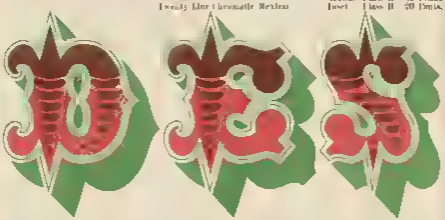
Twenty Line Border No. 1st $ 10 per foot, Complete

Printed with WARREN'S INKS from H. B. Wade & Co., 111 Fulton & 26 Ann Sts., New York

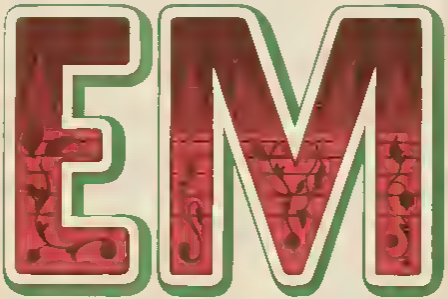
MANUFACTURED BY

Wm. H. Page & Co.

Twenty Line Ornamental Medium — Outside, Class H, 32 Units. Inset, Class H, 20 Units.



Twenty Eight Line Ornamental Outside Ornamented No 1. — Outside, Class H, 46 Units. Inset, Class H, 28 Units.



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Wm. H. Page & Co.


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Wm. H. Page & Co.
GREENEVILLE, CONN.

MANUFACTURED BY

Wm. H. Page & Co.

Thirty two Line Brevier. Class I 1 Cents.

Two Line Ring Border No. 1 $2.25 per font complete Cut from 4 to 14 Lines Pica.

Printed with WARREN'S INKS, from R. H. Read & Co., 70 Vesey St., New York

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ROWING

PUBLIC

MAKE

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Wm. H. Page & Co.

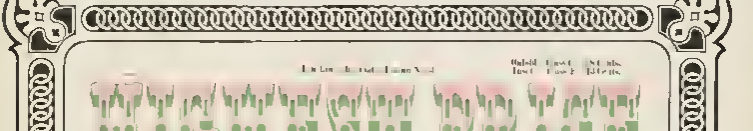
DURABLE DESIGNS!

WORSHIPERS

CELEBRATION

MANUFACTURERS

Wm. H. Page & Co.



Printed with WARD'S Oils, by H. O. W. A. Co., New York


Wm. H. Page & Co.
MINGLE
KIND


BOUND


GIRL

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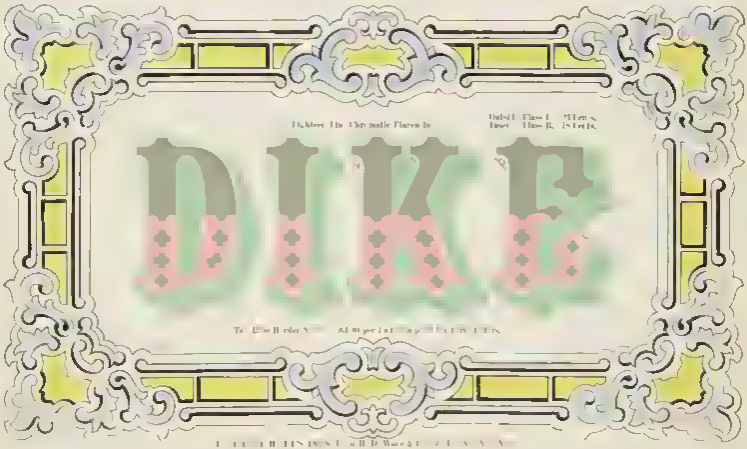
Wm. H. Page & Co.

GERM

DIKE

MANUFACTURED BY

Wm. H. Page & Co.



Wm. H. Page & Co.

GRAND MARCH!

DISTINGUISH

ROUTINE

PROUD

MANUFACTURED BY

Wm. H. Page & Co.

Ornamental Wood and Metal Type, Borders, Rules, Leads, Slugs, Quads, Etc.

Ten Line Chromatic French Open Shaded Ornamented No. 1 — Outside, Line 1 Inside, Line 2 — In Lengths, 15 Ems

NUMEROUS

Fifteen Line Chromatic French Open Shaded Ornamented No. 1 — Outside, Line 1 Inside, Line 2 — In Lengths, 15 Ems

STOLEN

Twenty Line Chromatic French Open Shaded Ornamented No. 1 — Outside, Line 1 Inside, Line 2 — In Lengths, 15 Ems

MIND

Twelve Line Rule Border $1.00 per foot

Printed at the WAYSIDE PRESS
for Wm. H. Page & Co., New York

Manufactured by Wm. H. Page & Co.

[illegible]

Sixteen Line [illegible] | [illegible] Each Color

RUSTIC

Twenty Line Chromatic Embellished | [illegible] Cents, Each Color

BRIDE

[illegible] | [illegible] Cents, Each [illegible]

MUN

[illegible]

[illegible]

MANUFACTURED BY

Wm. H. Page & Co.

BRUSHED DESIGN HOUSE

Manufactured by Wm. H. Page & Co.

BOSTON SKETCH

INTRODUCE

HOUSED

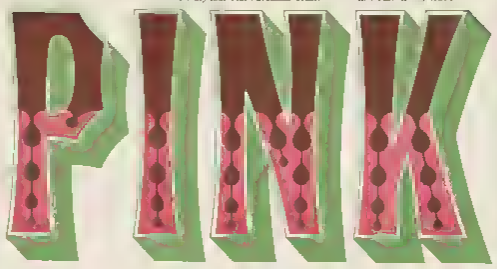
SINCE

MANUFACTURED BY

Wm. H. Page & Co.

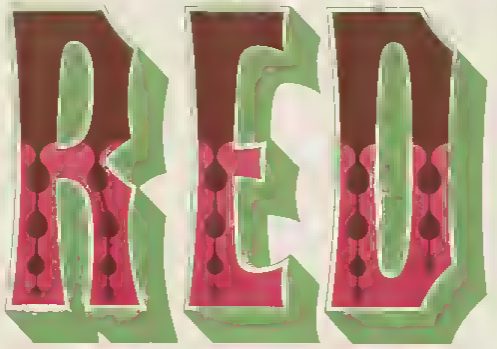
Twenty-four Line Chromatic Ornate

Green Class F 35 Cents.
Red Class H 35 Cents.



Thirty-six Line Chromatic Ornate.

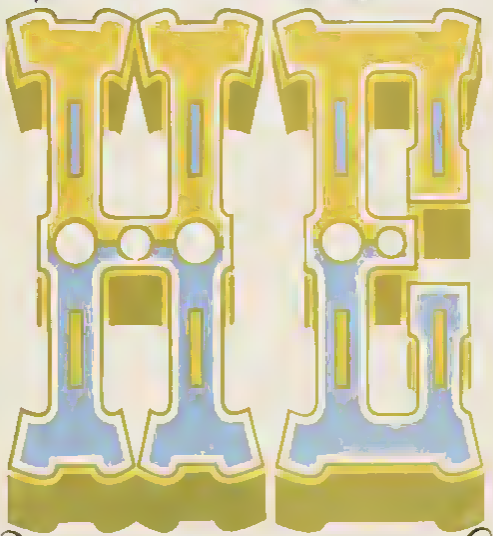
Green Class F 35 Cents.
Red Class H 35 Cents.



Ten Line Ring Border $1.50 per font. Full from 4 in 14 Lines Pica.

MANUFACTURED BY

Wm. H. Page & Co.



FANCY TYPE FOUNDRY

Wm. H. Page & Co.

Purely Decorative Outline Ornamented

Green, Class B. 20 Cents.
Red Class C 25 Cents.

Thirty Two Line Ornamental Celtic Ornamented.

Green, Class B. 20 Cents.
Red Class C 25 Cents.

Ten Line Roman No. II. All upper Case. Cast from the 11 Lines Line.

Printed with WILSON INKS, from W. H. Wade & Co. 48 Ann St. New York

MANUFACTURED BY

Wm. H. Page & Co.

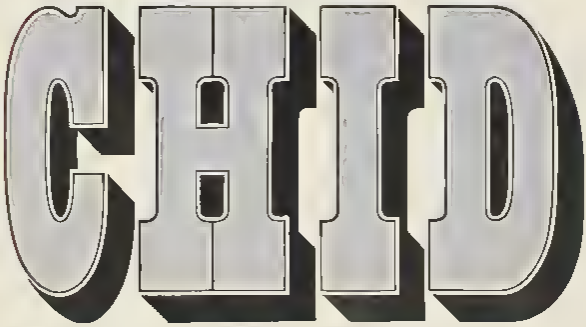
Six Line Pica. Outside, Class F. 110 pts.
Inset Class R. 11 pts.

Twelve Line Pica Ornamented. Class I. 12 Pts. Each Line.

Twenty Line Pica. Outside, Class F. 35 Cents
Inset Class R. 20 Cents.

Two Line Pica Border No. 1. 48 Pieces.

Manufactured by Wm. H. Page & Co.



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Wm. H. Page & Co.

TEA MERCHANT

PINE ISLAND

JOURNALS

CHIDE

Six Line Band r S 74 $1.25 per foot.

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Wm. H. Page & Co.

DETRIMENT

PRISON

UNTIE

Manufactured by Wm. H. Page & Co.

PIONEERS

BUGLER

GONE

DUE

Printed with WADE'S INKS, from H. H. Wade & Co., 40 Ann St., New York

Manufactured by Wm. H. Page & Co.

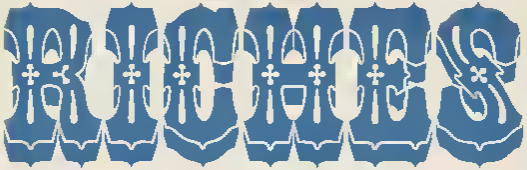
SOUR DRINK

BOARDING

BELGIAN

MANUFACTURED BY

Wm. H. Page & Co.



Printed at WALTER SINKS 6 to 10 N. Theodore St. 30 Ann St., New York

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Wm. H. Page & Co.

LIGHTHOUSE

MUSKETS

CEYLON

HOUSE

Printed by H. WARREN INKS, from H. H. Wade & Co.'s Old Stand 90 John St. New York

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Wm. H. Page & Co.

SPOIL

DIN

MANUFACTURED BY

Wm. H. Page & Co.

RUGS

HOI

MANUFACTURED BY

Wm. H. Page & Co.

Made Up Chromatic Line No. 1 Class C 36 Cents, Each Color

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Wm. H. Page & Co.

Six Line Roman No. 1 Class F 11 Cents.

Six Line Florentine Class F 11 Cents.

Six Line Horsehoe Ornamented Class F 11 Cents.

Six Line Aldine Ornamented. Class K 8 Cents.

Eight Line Etruscan [illegible] Class K 11 Cents.

[illegible]

Printed at [illegible]

MANUFACTURED BY

Wm. H. Page & Co.

Six Line Chain Border No. 8...0 per foot. Letter to

MANUFACTURED BY

Wm. H. Page & Co.

[illegible]

[illegible] Three Braids of Six Threads, Each Color

Braids

[illegible] Three Braids of Six Threads, Each Color

Made

[illegible] Three Braids of Six Threads, Each Color

Of

[illegible]

MANUFACTURED BY

Wm. H. Page & Co.

CHAMPION

BRONZES

TINDER

UNITE

HEM

MANUFACTURED BY

Wm. H. Page & Co.

MOUNDS

BLUE

MANUFACTURED BY

Wm. H. Page & Co.

MANUFACTURED BY

Wm. H. Page & Co.

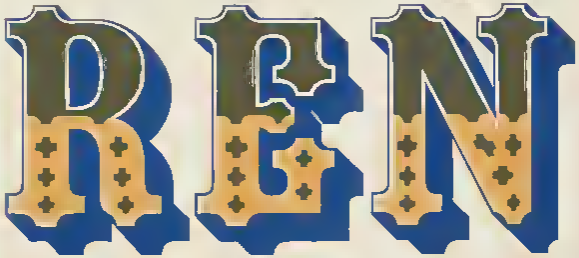
MANUFACTURED BY

Wm. H. Page & Co.

[illegible]

Three Lines Line Chromatic Florentine.

[illegible] Lines P. [illegible]
Used [illegible] Lines H. [illegible]



[illegible] Lines [illegible]

Unbold ... Lines P. 40 Cents.
Based ... Lines K. 40 Cents.

[illegible]

Copied with WAITE'S INKS from H. H. Wade & Co., 42 and 44 Vesey St., New York

Wm. H. Page & Co.

PREDOMINANT SUBSTANCE MUSICIAN GENUS

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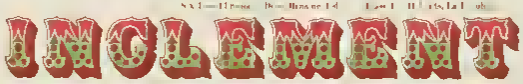
Wm. H. Page & Co.

HORSEMEN HOUND DICE

MANUFACTURED BY

Wm. H. Page & Co.



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Wm. H. Page & Co.

PROWLING TIGERS BUSH

Printed at J. WARD'S INKS, from H. B. Wade & Co., 48 Ann St., New York

MANUFACTURED BY

Wm. H. Page & Co.

FOUNDER

SMITH

BEST

MANUFACTURED BY

Wm. H. Page & Co.

[illegible]

RIND

[illegible] Class I. 25 Cents, Each Color

USE

[illegible]

Printed with WAHL'S INKS, from H. D. Madeira & Co. 60 Ann St. New York

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Wm. H. Page & Co.

Eight Line National Border $8.00 per font complete

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Wm. H. Page & Co.

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THROWING MODELS BIRD

MANUFACTURED BY

Wm. H. Page & Co.

MANUFACTURED BY

Wm. H. Page & Co.

IMPEACHED

GROUND

BIRCH

MANUFACTURED BY

Wm. H. Page & Co.

NUMERATION

CHAINS

RIDE

MANUFACTURED BY

Wm. H. Page & Co.


Wm. H. Page & Co.

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